Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

ALAN B. LEVAN AND BANKATLANTIC FINANCIAL CORPORATION,
Petitioners,

v.

CAPITAL CITIES/ABC, INC. AND WILLIAM H. WILLSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, in a defamation action, an appellate court's "independent review" of the trial record, as contemplated by *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), can supplant a jury's findings on preliminary questions regarding a broadcast's "gist" and its falsity, as the Eleventh Circuit has now held, or must be confined to the question of actual malice, as other courts of appeals have held.

2. Whether, in conducting "independent review" in a defamation action, an appellate court must, under *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), identify the preliminary facts the jury must have found, consider those facts and any undisputed facts to be true, and determine if actual malice is established under those facts, or is free to make *de novo* findings of preliminary facts, as the Eleventh Circuit did below.

PARTIES TO THE PROCEEDINGS

The following list identifies all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit:

Alan B. Levan
BankAtlantic Financial Corporation
Capital Cities/ABC, Inc.
William H. Willson

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state the following: BankAtlantic Financial Corporation is now known as BFC Financial Corporation. BFC Financial Corporation has no parent company, and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	3
JURISDICTION	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT	3
1. Evidence Regarding The Gist	6
2. Evidence Regarding Falsity	8
3. Evidence Regarding Actual Malice	9
4. The Opinion Below	13
REASONS FOR GRANTING THE PETITION	17
I. THE ELEVENTH CIRCUIT'S CONCLUSION THAT "INDEPENDENT REVIEW" EXTENDS TO THE PRELIMINARY FACTUAL QUESTIONS OF GIST AND FALSITY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS	19
II. THE ELEVENTH CIRCUIT IGNORED THE INQUIRY THIS COURT PRESCRIBED IN *CONNAUGHTON*	25
CONCLUSION	30

TABLE OF AUTHORITIES

CASES — Page

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984) 17, 19, 20
Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993) 16
Brown v. Petrolite Corp., 965 F.2d 38 (5th Cir. 1992) 24
Brown & Williamson Tobacco Corp. v. Jacobson, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988) 18
Connaughton v. Harte-Hanks Communications, Inc., 842 F.2d 825 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989) 30
Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (9th Cir. 1997) 18
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) .. 22
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989) ..... *passim*
Kaelin v. Globe Communications Corp., 162 F.3d 1036 (9th Cir. 1998) 22
Lundell Mfg. Co. v. American Broad. Cos., 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997) 20, 21, 23, 24
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) 20, 21
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) 20, 21
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 19, 22
Newton v. National Broad. Co., 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991) 18
Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556 (5th Cir. 1997) 14, 23, 24
Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988) 23
Tavoulareas v. Piro, 817 F.2d 762 (D.C. Cir.) (*en banc*), *cert. denied*, 484 U.S. 870 (1987) 29

TABLE OF AUTHORITIES—Continued

Page

Weller v. American Broad. Cos., 232 Cal. App. 3d 991 (Cal. Ct. App. 1991) 24, 25

CONSTITUTION AND STATUTES

U.S. Const.:

Amend. I ..... *passim*
Amend. VII 2, 3, 24
Amend. XIV 2, 3
28 U.S.C. § 1254(1) 3

OTHER MATERIALS

Robert D. Sack, *Sack on Defamation* (3d ed. 1999) 18

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The jury in this defamation action found by a preponderance of the evidence that the producers of the ABC television newsmagazine "20/20" published a broadcast conveying the false message that petitioners deliberately misled their investors. The jury separately found by clear and convincing evidence that respondents published the broadcast with "actual malice"—knowledge of its falsity or substantial doubt as to its truth. The jury awarded damages totaling $10 million, and the district court entered judgment on that verdict.

In reversing the jury's verdict, the Eleventh Circuit panel ventured into an area of law it deemed "unsettled" and subject to "some confusion." The court then decided one of the two principal issues before it in a manner that conflicts with the decisions of other courts of appeals—

a conflict that the Eleventh Circuit itself acknowledged—and it decided the remaining issue in a manner that departs sharply from this Court's precedent.

First, believing that its "independent review" obligation under this Court's decisions extended not only to the question of actual malice but also to preliminary factual issues, the court of appeals took away from the trier of fact and decided for itself *de novo* the threshold questions of the broadcast's core message or "gist" and the falsity of that message. Before doing so, the court recognized that, if it accepted the version of the broadcast's gist petitioners urged at trial, the evidence tended to establish both falsity and actual malice. Other circuits, relying on this Court's decisions, have concluded that the determinations of gist and falsity are for the trier of fact and are not subject to "independent review" by appellate judges.

Second, disregarding this Court's guidance in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), the Eleventh Circuit made no effort, in conducting its "independent review," to identify the preliminary facts that the jury "must have" found to support a conclusion of actual malice. Instead, the court simply accepted as true most of respondents' view of the facts and ignored the contrary determinations the jury must have made.

Because it raises outcome-determinative issues that lie at the crossroads of the First, Seventh, and Fourteenth Amendments in defamation suits under state law, this case warrants this Court's plenary review. In *Connaughton*, this Court recognized its special responsibility to mark the limits of appellate review in actual malice cases. Ultimately, only this Court can determine how, in the context of "independent review," the First Amendment interacts with the states' application of defamation law, and the Seventh Amendment's guaranty of trial by jury.

The Court has not done so in nearly a decade. In light of the chasm between the Eleventh Circuit's view and the view of other courts of appeals concerning the breadth of an appellate court's ability to supplant the jury, and in light of the Eleventh Circuit's disregard of the analytical approach this Court prescribed in *Connaughton*, this case represents an especially suitable vehicle for exercise of that responsibility.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 190 F.3d 1230. The district court's order denying respondents' renewed motion for judgment as a matter of law or in the alternative for a new trial or remittitur (Pet. App. 29a-30a) is not reported.

JURISDICTION

The court of appeals entered judgment on September 29, 1999. Pursuant to the mandate issued by the court of appeals, the district court entered final judgment in favor of respondents on December 14, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The questions presented implicate the First, Seventh, and Fourteenth Amendments to the United States Constitution, U.S. Const. amends. I, VII, XIV. The relevant portions of these provisions are reproduced in the appendix (Pet. App. 73a).

STATEMENT

In this diversity libel action filed in February 1992, petitioners alleged that ABC and William H. Willson broadcast a defamatory story on "20/20" before a national audience of approximately 20 million viewers in November 1991. A pivotal issue in the seven-week jury trial concerned the central message or "gist" of the broad-

cast. Petitioners argued that the gist was that Mr. Levan and his company, BFC, had knowingly misled their investors.[1] The evidence included an admission by Mr. Willson, the broadcast's producer, that he knew prior to broadcast that *that* gist was simply untrue. Mr. Willson told the jury that he had listened to Mr. Levan describe the transactions on two separate occasions, and had concluded that Mr. Levan believed passionately in their fairness:

> Actually, I was hoping to get shots of Mr. Levan defending himself, what he believed—*defending what he believed was a very fair deal very passionately.* And when I met with him in the off-the-record meeting [and] at Congress, he did that, and I wished our viewers had the opportunity to see that.

42 Tr. 1624 (emphasis supplied).[2]

Faced with Mr. Willson's testimony, ABC sought to recharacterize the gist of the broadcast in a way that would not lead inexorably to a finding of actual malice. ABC argued to the jury that the gist was *not* that Mr. Levan and his company had knowingly misled their investors, but merely that the transactions were unfair to the investors. 62 Tr. 4548. Under ABC's theory, be-

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[1] Prior to trial, the U.S. Magistrate Judge assigned to the case agreed, concluding that the gist of the broadcast "lead[s] the average viewer to assume that [petitioners] knowingly tried to dupe the limited partners into accepting an unfair transaction." Pet. App. 71a; *see also id.* at 59a; 9 R203-18 (volume 9, document entry 203, page 18, of the record). The district court agreed. *See* Pet. App. 56a. ABC too embraced this version of the gist, at least before it discovered its witnesses would admit that this gist was knowingly false. For example, in attempting to secure summary judgment, ABC favorably cited the court's conclusion that "the broadcast . . . reported that [petitioners'] roll-up transaction 'was unfair to the limited partners, but that [petitioners] who knew better, endorsed it anyway' to their partners." 13 R276-1, 4.

[2] 42 Tr. 1624 refers to volume 42, page 1624, of the multi-volume trial transcript.

cause it had gathered information from sources critical of the transactions, it had ample basis for believing that the transactions were in fact unfair to investors.

ABC argued to the district court that the first question the jury must decide was the gist of the broadcast, 22 R451-29; and the court accepted ABC's proposed instructions on this issue:

> The first question before you that you must decide is: What was the gist, the core, the substance, the essential message of the broadcast? The gist is merely a summary of the heart of what the broadcast was about. In deciding what the gist of the broadcast was, you should consider the broadcast in its totality and assess it through the eyes of the average viewer. You should give the broadcast the meaning that the average viewer would have given it.

Pet. App. 45a.

The court presented the jury with a verdict form that required a response to each of the following questions as to each plaintiff and defendant:

> Has [Plaintiff] proved by the greater weight of the evidence that the gist of the broadcast was false?
>
> If your answer to Question 1 is yes, has [Plaintiff] proved by clear and convincing evidence that [Defendant] published the broadcast with knowledge of falsity or serious doubts as to its truth?
>
> If your answers to Questions 1 and 2 are yes, please set forth the amount of damages, if any, that [Defendant] should pay to [Plaintiff].

Id. at 31a-32a, 34a-35a.

The jury answered in the affirmative as to each plaintiff and defendant on each verdict form, and awarded damages totaling $10 million. *Id.*

1. *Evidence Regarding The Gist*

There was, indeed, substantial evidence from which the jury could reasonably have concluded, and in fact must have concluded, that the broadcast's gist was as petitioners had argued—that Mr. Levan and BFC had knowingly misled their investors—and that *that* gist was false. First and foremost, John Stossel, the reporter on the broadcast and the author of much of its copy, admitted that the gist he intended was that Mr. Levan *knowingly* misled his investors:

> Q. It was your intent to portray Mr. Levan as someone who knowingly misled his investors, was it not?
>
> A. Who misled his investors? Definitely.
>
> Q. Knowingly misled his investors?
>
> A. Yes, sir.

58 Tr. 3900.

The jury also viewed the videotape of the broadcast on a number of occasions, and heard testimony of ABC witnesses regarding how the core message of the story was constructed. The videotape revealed that a minimum of time was spent discussing the terms of the transaction, and a substantial amount of time was spent discussing Mr. Levan's background and wealth, and his numerous purported attempts to hide from ABC. P.Ex. 721v (plaintiffs' trial exhibit 721v). Shortly before airing the broadcast, 20/20's Executive Producer amended the story's introduction—which ABC viewed as its "headline" or "book jacket cover," 44 Tr. 1936; 47 Tr. 2553—to add the words "the man behind it wouldn't talk to us." 47 Tr. 2559-60. ABC knew this statement was false: Mr. Levan had met with ABC Producer Willson for most of a day, agreed that the discussion could be "on the record," repeatedly requested in writing to meet with ABC again,

and agreed to appear for a taped interview with Mr. Stossel pursuant to written ground rules—ground rules on which ABC later reneged. P.Ex. 1; P.Ex. 308A.1-A.4, P.Ex. 7; P.Ex. 8; 45 Tr. 2236-56; 46 Tr. 2316-24; 41 Tr. 1234-57; 35 Tr. 374-76. Mr. Willson approved the addition of "the man behind it wouldn't talk to us," 47 Tr. 2563, and admitted to the jury that its message was, "this guy has something to hide." 42 Tr. 1485-86. The evidence also reflected that, months before the broadcast, Mr. Willson had told Mr. Levan's lawyer, Eugene Stearns, that he would portray Mr. Levan in this fashion in order to prove his guilty knowledge. P.Ex. 7; 46 Tr. 2324-44.

The broadcast contained a number of additional segments that had nothing to do with the fairness of the transactions, but were created to suggest that Mr. Levan had something to hide, including: (1) a segment showing ABC cameras denied access to a "general partners' meeting" and suggesting a connection to Mr. Levan when in fact none existed; (2) a segment stating that ABC cameras were denied access to the offices of BFC's proxy solicitor, which Mr. Stossel admitted created the impression that there was "something going on in that building" that someone didn't want the public to see, 58 Tr. 3905-06, when, in fact, the same company handled proxy solicitations for ABC itself, *see id.*; (3) ABC's knowingly false explanation of the circumstances that led to the cancellation of the Levan interview with Mr. Stossel; (4) ABC's reporting of Mr. Levan's decision to testify before Congress in the absence of television cameras, P.Ex. 721v; (5) shots of Mr. Levan apparently avoiding ABC's cameras in the halls of Congress, editing out segments in which Mr. Levan spoke before those cameras, P.Ex. 189v; and (6) shots of the gates closing—symbolically on ABC and BFC investors—at the Levan home.

The jury heard Mr. Stossel, who wrote the script for the broadcast, admit that many of these segments would

lead a reasonable viewer to conclude that Mr. Levan was hiding from ABC. 47 Tr. 2649, 2666; 58 Tr. 3902, 3905-06. While ABC's head of standards and practices had voiced pre-broadcast concerns that one of these examples was "silly and unrelated" and that the attempt to gain access to the proxy solicitor made ABC "look like petulant fools," P.Ex. 9, the jury was able to view the notes from a meeting of 20/20's senior executives reflecting why these segments were included: those notes disclosed that these examples were strung together to cause the audience to ask, "what's he trying to hide?" 44 Tr. 2003-04; P.Ex. 82, at BB415. Thus, there was substantial evidence from which the jury must have concluded that ABC was able to fulfill Mr. Stossel's admitted goal of showing Mr. Levan as someone who had *knowingly* misled his investors, in part by portraying him as a man "with something to hide."

2. *Evidence Regarding Falsity*

Having accepted petitioners' view of the story's gist, the jury had substantial evidence from which it could reasonably conclude, and must have concluded, that this gist was false. In fact, Mr. Willson admitted it was false; he testified that he became convinced that Mr. Levan believed, as Mr. Willson put it, "very passionately" in the fairness of the transaction. 42 Tr. 1624; 42 Tr. 1538-39.

In addition to Mr. Willson's admission, there was undisputed evidence that Mr. Levan believed that the transactions were fair, 34 Tr. 244-48; 42 Tr. 1624; and the jury heard days of testimony and substantial evidence establishing that Mr. Levan's belief was well founded. That evidence showed, *inter alia*: that the transactions were designed to protect the investors from the abuses of "rollups," transactions undertaken by other real estate partnerships, 45 Tr. 2227-28; 35 Tr. 344-46; that the transactions required a majority vote of all investors, 34

Tr. 187; that investors who voted approved the transaction by a 2-1 margin, 57 Tr. 3675-78; that what BFC investors gave up was not "real estate" valued at over $44 million but limited partnership certificates that had, *prior* to the exchange, through no fault of petitioners, lost 90% or more of their value and continued to plummet in value, 34 Tr. 225-58; P.Ex. 458, at App.D; 59 Tr. 4067-71; 55 Tr. 3413-20; that the only expert offered by either party who actually compared what investors gave up to what they received in the exchange concluded that the transaction was fair, 38 Tr. 786-808; that what BFC gave the investors in return for their near-worthless certificates were bonds backed by the strength of its main asset, BankAtlantic, 34 Tr. 225-58; 39 Tr. 1006-08;[3] that Mr. Levan believed his plan for BankAtlantic was sound, and would inure to the benefit of the investors, and that time proved Mr. Levan correct, as BankAtlantic prospered, 34 Tr. 203-06; 35 Tr. 398; 40 Tr. 1040-42.

3. *Evidence Regarding Actual Malice*

The jury was required to consider next whether petitioners proved by clear and convincing evidence that ABC published the false broadcast with actual malice—which the court defined as "knowledge of its falsity or substan-

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[3] Expert Steven Goldstein concluded that the value of the BFC bonds given in exchange for the certificates was $21 million. 38 Tr. 794. Mr. Goldstein's analysis was based on his evaluation of BankAtlantic. While ABC's "fairness" experts harshly criticized the bonds, and while those critiques were heavily relied upon by the Eleventh Circuit, the jury recognized the two factors that made the investors willing to accept them. First, ABC's experts were admittedly ill-equipped to analyze BankAtlantic, and did not actually do so. 59 Tr. 4058-60, 4066-67; 55 Tr. 3424-29. Second, the limited partnership certificates that the investors held before the exchange had lost most of their value. ABC's experts admittedly did not focus on the certificates, 55 Tr. 3424-29, despite their acknowledgment that there was little or no market for the certificates at the time of the exchange, 59 Tr. 4066-71.

tial doubt as to its truth." Pet. App. 32a, 35a. The jury found that ABC had in fact acted with actual malice, and the record established a clear and convincing foundation for that finding.

In addition to Mr. Willson's admission that he knew that the core message of the broadcast was false, the jury considered additional direct evidence showing that ABC acted with knowledge of the falsity of its broadcast or substantial doubt as to its truth. Mr. Levan and Mr. Stearns testified that, at their five to six hour pre-broadcast meeting with Mr. Willson, Mr. Willson admitted that, despite the information he gathered from other sources, Mr. Levan's transactions were "completely different" from the "rollup" transactions that had been the subject of congressional scrutiny. 35 Tr. 344-46; 45 Tr. 2249. Mr. Willson said he had chosen to focus on Mr. Levan because television was a "visual medium" and the central figures in *abusive* rollups were bankrupt or had gone to jail. *See id.* They testified that Mr. Willson repeatedly announced what he intended to broadcast and, when it was explained why those charges simply were not true, repeatedly responded that "Truth is not my job," "I don't care about the truth," "The truth is irrelevant to me," or words to that effect. 35 Tr. 349-51, 367; 45 Tr. 2249-51; 46 Tr. 2331, 2344-45; P.Ex. 7, at 15; 41 Tr. 1239. Mr. Stearns testified, and the record contained his contemporaneous supporting documentation, that Mr. Willson repeated this statement several times over a period of months, in varying contexts, whenever he was so confronted. 45 Tr. 2249-51; 46 Tr. 2331, 2344-45; P.Ex. 7, at 15. The evidence also established that ABC knew that Mr. Levan was not hiding from ABC and that he had in fact repeatedly requested additional opportunities to meet with ABC representatives. 46 Tr. 2353; P.Ex. 7; P.Ex. 8; 45 Tr. 2344; 54 Tr. 3150-52. Nevertheless, ABC began its broadcast by announcing that Mr. Levan "wouldn't

talk to us," and included in its broadcast numerous purported examples of Mr. Levan avoiding ABC, all aimed at implying that Mr. Levan had something to hide.

ABC offered responsive evidence attempting to show, in part through Mr. Willson's testimony, that much of Mr. Levan's and Mr. Stearns' recollections of their lengthy meeting were untrue, and that, notwithstanding Mr. Stossel's admission, Mr. Willson did not mean to create the impression that Mr. Levan had knowingly misled his investors and hid from ABC. *See* 42 Tr. 1485-87, 1518-61. The jury was entirely free to reject Mr. Willson's credibility on these points and to credit instead petitioners' witnesses and Mr. Stossel's admission as to the message he intended in the broadcast.

The jury also considered substantial indirect evidence of actual malice, including evidence of ABC's deliberate attempts to blind itself to, or twist, the truth. While ABC argued to the jury and the Eleventh Circuit that it could not find sources who would speak in favor of the transaction, the evidence reflected that ABC sought only negative information and systematically weeded out investors and others who had positive views of the exchange. The jury reviewed ABC call sheets that described investors who voted in favor of the exchange as "not good" or "not angry enough." 40 Tr. 1157-72; P.Exs. 93-100. One investor contacted by ABC testified that ABC "was trying to get me to say that I didn't think [the exchange] was a fair deal." 40 Tr. 1144-46. When that investor refused to agree, the ABC representative "sort of went the other way with me and I never heard from her again." *Id.* His call sheet was marked, "not good." P.Ex. 96. ABC also refused to interview Steven Goldstein, a savings industry analyst and the former Deputy Director of Policy for the Federal Home Loan Bank Board, 38 Tr. 780-84, who

would ultimately be the only expert who offered an opinion on the fairness of the transaction based upon an analysis of BankAtlantic, 38 Tr. 786-808. *See* note 3, *supra.*

The jury also considered the fact that ABC had altered videotape of questions and answers supplied by Mr. Levan at ABC's request. P.Ex. 76; 46 Tr. 2371-72; 43 Tr. 1846; 42 Tr. 1600-05. ABC's contemporaneous notes reflected a direction from 20/20's Executive Producer to "make it look like it wasn't a good idea to send us tape." 44 Tr. 1999-2000; P.Ex. 82, at BB418. ABC did just that, replacing a benign question with a voice-over intended to suggest that Mr. Levan had purposely misled his investors while building a personal fortune, 47 Tr. 2663-64; 58 Tr. 3874, 3957, and editing another question and answer to fabricate an admission that Mr. Levan kept funds from the exchange for himself when in fact he had not, P.Ex. 76; P.Ex. 721v.

In addition, the evidence showed that ABC manipulated videotape to create an event that simply did not occur. Tape of a Congressman's introductory remarks made hours before Mr. Levan appeared to testify was doctored to create the impression that the Congressman had in fact reached a harsh conclusion *after* Mr. Levan's testimony, and delivered that conclusion to Mr. Levan personally.[4] 35 Tr. 379-80, 419; 40 Tr. 1120-31.

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[4] ABC failed to convince the jury, but was able to convince the Eleventh Circuit, to ignore this clear and convincing evidence, because it had relied on "independent sources" and testimony at a congressional hearing that criticized the transactions. There were a number of reasons why the jury would choose to reject this defense. First, as noted above, there was dramatic evidence proving that ABC shunned sources supporting the transactions. 40 Tr. 1157-72; P.Exs. 93-100. Second, none of the sources ABC chose stated that petitioners *knowingly* misled their investors. Third, ABC failed to dispute the fact that none of its sources who derided

Having found that ABC acted with actual malice, the jury then concluded that petitioners had been profoundly damaged and awarded damages totaling $10 million.

Post-trial, ABC asked the district court to overturn the jury's verdict. One of ABC's central arguments was that petitioners' view of the gist "enormously overstates the extent to which the 'essential message' of the broadcast concerned Mr. Levan's state of mind as to his limited partners." 26 R637-22. ABC insisted that the district court had the power and duty to revisit the gist of the broadcast, along with all other factual disputes, as part of its obligation to conduct an "independent review," and that it should accept as a matter of law the less damaging view of the gist ABC had offered. *See* 26 R637-5 to 42. The district court denied ABC's post-trial motions in their entirety. *See* Pet. App. 29a-30a.

4. *The Opinion Below*

The Eleventh Circuit vacated the district court's judgment and remanded the case with instructions to enter judgment for respondents. *See* Pet. App. 26a.

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the bonds offered an opinion on the *fairness of the transaction*: they could not, because none had compared the bonds to the nearly worthless certificates the investors chose (by a 2 to 1 margin, 57 Tr. 3675) to exchange for them. 54 Tr. 3230-32; 58 Tr. 3899; 59 Tr. 4075, 4114; 55 Tr. 3421-25. Fourth, the congressional hearing upon which ABC relied actually *concluded* favorably with Mr. Levan's testimony, at the end of which the Committee Chairman noted to Mr. Levan, "I like you. You are an interesting fellow." Mr. Levan then stated that he hoped he would not be invited back, and the hearing ended with laughter. 35 Tr. 380. The jury must have determined that, although ABC had videotaped hours of the hearing, the only tape actually included in the broadcast was that of Congressman Bliley's introductory remarks that had been doctored to imply a face-to-face confrontation with Mr. Levan. Finally, the jury must have believed Mr. Stearns and Mr. Levan, who testified that, despite these "independent sources," Mr. Willson expressed to them substantial doubts regarding the core message ABC would ultimately broadcast.

The Eleventh Circuit's conclusion admittedly hinged on its understanding of an appellate court's proper role in reviewing a libel verdict in a public-figure case. The court began with the principle, drawn from this Court's decisions, that a reviewing court must conduct "an 'independent examination of the entire record' . . . to determine whether the evidence offered at trial supports a finding of actual malice." *Id.* at 16a-17a. It perceived "some confusion," however, concerning "how this review relates to factual findings made by the jury," *id.* at 17a. Specifically, the court believed that "the law is unsettled as to the deference that we give to 'facts' found by the jury." *Id.* at 17a, n.27. While acknowledging (with a "*but see*" reference) the Fifth Circuit's holding that "no special review is accorded to 'preliminary factual issues,'" *id.* at 17a (citing *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997)), the court nonetheless proceeded on the assumption that—apart from "credibility determinations," which "are reviewed under a clearly erroneous standard because of the jury's 'opportunity to observe the demeanor of the witnesses,'" *id.*—its "independent review" obligation extends not only to the question of actual malice, but also to the dispute concerning the broadcast's "gist." *Id.* at 18a. As the court stated, "[o]ur first job . . . is to determine the gist or sting of the report." *Id.*[5]

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[5] The court of appeals stated that "[t]he parties agree that we must determine what the report, taken as a whole, is actually alleging about Levan, and then determine if ABC broadcast that meaning with actual malice." Pet. App. 18a, n.28. But petitioners never agreed to any such thing. On the contrary, petitioners vigorously disputed ABC's argument to that effect, as the following excerpt from petitioners' reply brief on appeal demonstrates:

> In our first brief, we noted that even ABC recognized the determination of the "gist" as a jury question. PB24. ABC, however, argues that as part of its "independent review" under the five-Justice majority opinion in *Bose Corp. v. Con-*

The court recognized that "the 'gist' or 'sting' of an alleged defamatory statement is a factual question," *id.* at 18a, n.28—a question that was hotly contested at trial in this case, that the jury resolved in petitioners' favor, and that was pivotal to the outcome on appeal. ABC argued, both at trial and on appeal, that the gist of the broadcast was merely that the rollups were unfair; in contrast, petitioners argued—and the jury must have found—that the gist was that Mr. Levan *knowingly* misled the limited partners into accepting the rollup transaction. Petitioners presented compelling evidence of "statements by ABC employees that they believed that Levan thought the transaction *was* fair," *id.* at 19a, n.30. The court accordingly acknowledged that

> [i]f the gist of the broadcast was, as [petitioners] contend, that Levan knowingly misled his investors, then these statements tend to demonstrate that [respondents] entertained serious doubts that the gist of their story was true.

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sumers Union of U.S., Inc., 466 U.S. 485 (1984), "it is for this Court to decide [apparently *de novo*] what the broadcast said." RB23. ABC overstates the boundaries of "independent review." Immediately after recognizing *Bose*'s "enhanced appellate review," the Supreme Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990), defined the "dispositive question" to be "whether a reasonable fact finder could conclude" that the statements implied a provably defamatory meaning. Post-*Milkovich*, in *Weller v. American Broadcasting Cos.*, 232 Cal. App. 3d 991 ([Cal. Ct. App.] 1991), after a $2.3 million jury verdict, ABC argued on appeal (as they do here) that its broadcast had an innocent message. The *Weller* court told ABC that their argument "misses the point": "If the broadcasts could reasonably have been understood as implying the defamatory statements upon which respondents based their claim, but also could have been understood in an innocent sense, the jury must decide the manner the broadcasts were ultimately understood." *Id.* at 1003.

Appellees' Reply Brief at 4 n.1.

Id. The court nonetheless considered itself free to make its own *de novo* determination of the broadcast's gist. That was so, in the court's view, because (1) "the gist of the report is intertwined with Levan's allegations of actual malice," [6] and (2) "[u]nlike other factual findings, ascertaining the gist does not depend on resolving credibility issues, which are better left to the factfinder." *Id.* at 18a, n.29.

Having acknowledged that actual malice would be established if petitioners'—and the jury's—view of the gist were accepted, the court then reported the results of its own, *de novo* review of the broadcast. The gist of the story, according to the court, was that "the limited partners got a raw deal, one so bad that a viewer would believe Levan *must* have known the deal was unfair to his limited partners, particularly in light of his financial expertise." *Id.* at 19a.

The court turned next to the question whether, given this judicially defined gist, the record "established actual malice by clear and convincing evidence." *Id.* at 20a. In conducting this aspect of its independent review, the court ignored the approach laid out in *Connaughton*, where this Court identified the facts that the jury "must have" found and then considered whether, in light of those findings and the undisputed evidence, petitioners had

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[6] The only support the court cited for this proposition was its own prior decision in *Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993), a case that did not involve actual malice, but in which the court suggested that *Bose* subjects *all* factual questions in a First Amendment case to "independent review." *See id.* at 1120 ("in cases involving First Amendment claims, an appellate court must undertake independent review of the record in order to make sure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression") (internal quotation marks and brackets omitted).

clearly and convincingly established actual malice. Instead, the court of appeals examined the evidence without regard to the jury's determinations, resolved for itself key factual disputes that the parties had presented to the jury, and even took judicial notice of information helpful to ABC.[7] On the basis of this unbridled inquiry, the court concluded that ABC had "overwhelming evidence . . . to support the broadcast's conclusion that the rollup was unfair to limited partners," evidence that the court claimed was mostly "undisputed." *Id.* at 17a, n.27.[8]

REASONS FOR GRANTING THE PETITION

This case squarely presents an important question of federal constitutional law that the court below considered "unsettled" and subject to "some confusion," and on which the court acknowledged a split in the circuits. The federal courts of appeals are indeed divided on whether the "independent review" contemplated by this Court in *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), is limited to the question of actual malice, or should extend as well to threshold factual questions of gist and falsity. The Third, Fifth, Eighth, and Ninth Circuits have taken the position that it should not be so extended—a position that finds strong support in the decisions of this Court. By contrast, the Eleventh Circuit has held that it should.

Even if the Eleventh Circuit were correct in subjecting the preliminary factual questions of gist and falsity to

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[7] To support its view regarding the preliminary factual issue of the fairness of the transaction, the court *sua sponte* took judicial notice of the Federal Reserve Board's reported Prime Rate of interest on the day BFC issued its 1989 prospectus, to argue that the bonds' yield was lower than that rate. Pet. App. 8a, n.12. This was a fact neither argued by ABC nor presented to the jury.

[8] As noted below, this evidence was, in fact, hotly disputed.

independent review, the court still erred by ignoring this Court's instructions in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), prescribing the proper *method* of conducting that review. In *Connaughton*, this Court instructed that, in conducting independent review, a court of appeals' first step must be to identify the facts the jury "must have" found to support a finding of actual malice; then, accepting those facts and any undisputed evidence as true, the appellate court must conduct an independent review to determine whether actual malice exists under those facts. The Eleventh Circuit undertook no such effort. To the contrary, it accepted most of ABC's facts as true and ignored facts and inferences to the contrary.

The court below has not been alone in its confusion. Courts and commentators viewing the state of the law in the decade after *Bose* and *Connaughton* have more generally noted a lack of clarity.[9] That lack of clarity has led to circuit conflict. This Court has recognized that it has a unique responsibility to provide guidance on this issue. As the Court stated in *Bose*, "this Court's role in mark-

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[9] One commentator who often sided with the media on these issues noted that "*Bose* and *Connaughton*, both difficult cases, wrestle with the independent review problem but do not quite resolve it. The extent to and circumstances under which a reviewing court in a public figure or public-official defamation suit may or must bow to the credibility judgments, expertise, factual familiarity, or general role of trial courts and trial juries remain muddy." Robert D. Sack, *Sack on Defamation* § 16.5.5.3 (3d ed. 1999). The Seventh Circuit made reference to the "knotty constitutional issue regarding what constitutes independent review," an issue it chose to avoid. *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119, 1128-29 (7th Cir. 1987), *cert. denied*, 485 U.S. 993 (1988). The Ninth Circuit has noted that striking the proper balance between the First Amendment and deference to juries is a "daunting task." *Newton v. National Broad. Co.*, 930 F.2d 662, 666 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991). "This is no doubt a difficult business." *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997).

ing the limits of this standard through the process of case-by-case adjudication is of special importance." *Bose*, 466 U.S. at 503; *accord Connaughton*, 491 U.S. at 686. It is now appropriate for this Court again to exercise that role.

I. THE ELEVENTH CIRCUIT'S CONCLUSION THAT "INDEPENDENT REVIEW" EXTENDS TO THE PRELIMINARY FACTUAL QUESTIONS OF GIST AND FALSITY CONFLICTS WITH DECISIONS OF OTHER CIRCUITS

1. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), this Court held that the First Amendment places limits on the application of the state law of defamation. This Court ruled that, where the plaintiff in a defamation case is a public figure, liability may not be imposed unless there is clear and convincing evidence that the defendant acted with so-called " 'actual malice'—that is, with knowledge that [the defendant's publication] was false or with reckless disregard of whether it was false or not." *Id.* at 279-80. In *Bose*, this Court concluded that, in this respect, appellate review must be more probing than normal. According to *Bose*, an appellate court must conduct an "independent review" to determine whether the evidence clearly and convincingly establishes actual malice. *Bose*, 466 U.S. at 511.

At the same time, however, the *Bose* Court made clear that the "independent review" requirement applies *only* to the question of actual malice:

> The independent review function is not equivalent to a "*de novo*" review of the ultimate judgment itself, in which a reviewing court makes an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered for plaintiff. If the reviewing court determines that actual malice has been established with convincing clarity,

> the judgment of the trial court may only be reversed on the ground of some other error of law or clearly erroneous finding of fact.

Id. at 514 n.31; *see id.* at 511; *see also Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522-25 (1991); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990).

2. In the wake of *Bose*, lower courts have disagreed as to the proper reach of independent review. As explained more fully below, the Third, Fifth, Eighth, and Ninth Circuits have correctly ruled that independent review applies only to the question of actual malice, and not as the Eleventh Circuit held below to preliminary questions of gist and falsity—questions so distinct from actual malice that they are subject to a different standard of proof at trial. There is thus a clear conflict on an issue that is often outcome determinative in defamation actions.

The view that independent review applies only to the question of actual malice is extensively articulated in *Lundell Manufacturing Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997). In *Lundell*, as here, the outcome of the case turned largely on the "gist" of an ABC television broadcast. The broadcast there reported, among other things, that a machine built by plaintiff Lundell "d[id] not work." *Id.* at 355. Lundell argued that the gist of the broadcast was that the machine was not mechanically sound, which ABC conceded was untrue. *Id.* ABC argued that the gist of the story was instead that the machine "did not work in a financially viable manner," which (ABC said) *was* true. *Id.* The jury rejected ABC's view and awarded substantial damages to Lundell. *Id.*

On appeal, ABC argued that, because "findings of falsity and substantial truth are subject to constitutional rules requiring independent review," the court should determine the gist of the story itself. *Id.* at 357. Lundell,

on the other hand, argued that the independent review mandated by this Court applied *only* to questions of actual malice, not to questions of gist and falsity. *See id.* The Eighth Circuit agreed with Lundell, concluding that the questions of gist and falsity were subject only to "substantial evidence" review. *See id.* at 357-62.

In reaching this conclusion, the *Lundell* court relied on *Masson*, in which the question of actual malice turned in part on the meaning and falsity of six passages in a magazine article, and in which this Court concluded that summary judgment was inappropriate because the meaning of the passages was a question for the jury. The Eighth Circuit explained:

> *Masson* makes abundantly clear that in reviewing a summary judgment ruling, which involves a similar standard as a review of a directed verdict ruling, we examine the evidence in the light most favorable to the plaintiff and decide if there is sufficient evidence to support a jury finding of falsity.

Id. at 358 (citing *Masson*, 501 U.S. at 522-25). The Eighth Circuit drew further support from *Milkovich*, in which this Court overturned a summary judgment in a defamation case. The *Lundell* court viewed *Milkovich* as rejecting the notion that independent review covers the question of the meaning of a published statement. *See id.* (citing *Milkovich*, 497 U.S. at 12).[10]

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[10] The Eighth Circuit also rejected the notion that *Masson* and *Milkovich* could be distinguished on the ground that, because they were decided on summary judgment, they did not bear on the duty of appellate courts to conduct an independent review of jury verdicts after they have been rendered. As the Eighth Circuit observed with regard to *Milkovich*: "The Court allowed the defamation action to go forward, ruling that a reasonable trier of fact could find that the [publication] could be interpreted as a false assertion of fact. Had the Court believed it must independently decide whether a statement constituted a false statement of fact, the Court would not have used this inquiry." *Lundell*, 98 F.3d at 358 (internal quotation marks and citations omitted).

Lundell, therefore, is in conflict with the Eleventh Circuit's decision in this case. As ABC correctly acknowledged in the district court below, the propositions upon which *Lundell* was based "run directly counter to" Eleventh Circuit law. 34 R626-14 n.11.[11]

The Eighth Circuit's conclusion is in accord with the decisions of other courts of appeals. For example, the Ninth Circuit reached a similar conclusion in *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998). At issue was a newspaper story about Kato Kaelin that led with the headline, "COPS THINK KATO DID IT! . . . he fears they want him for perjury, say his pals." *Id.* at 1038. Kaelin sued, arguing that the headline falsely implied that the police suspected him of a well-publicized murder. The Ninth Circuit reversed the district court's grant of summary judgment for defendant Globe, holding:

> Globe argues that the "it" refers to perjury. Even assuming that such a reading is reasonably possible, it is not the only reading that is reasonably possible as a matter of law. So long as the publication is reasonably susceptible of a defamatory meaning, a factual question for the jury exists.

Id. at 1040; *see id.* at 1041. Plainly, then, the Ninth Circuit determined that, in a public figure/actual malice case,

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11 Despite this admission, ABC attempted to distinguish *Lundell* in the district court by arguing that Lundell was not a public figure, and that therefore the state of mind standard set forth in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) (requiring only negligence as to falsity), applied instead of the standard set forth in *New York Times Co. v. Sullivan* (requiring knowledge or recklessness as to falsity). For present purposes, however, this distinction makes no difference. As illustrated by the Eighth Circuit's analysis, ABC's argument that substantive federal rules concerning the defendant's state of mind as to falsity necessarily require independent review of the preliminary issue of falsity follows the same path under either standard. Indeed, the Eighth Circuit in *Lundell* rested its analysis on its reading of actual malice decisions.

the preliminary questions of gist and falsity are questions for the jury to determine.[12]

To similar effect is *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988), a case cited by the *Lundell* court in support of its holding. 98 F.3d at 358. *Schiavone* concerned a report in Time magazine that "the name of [New Jersey construction company] Schiavone appeared several times in the [FBI's] reports on the 1975 disappearance of former Teamsters Boss Jimmy Hoffa." 847 F.2d at 1074. Although determining that Schiavone was a public figure for purposes of First Amendment law, the court of appeals held that Time was not entitled to summary judgment on actual malice grounds. The court also reversed the district court's determination of the preliminary issue of the gist of Time's report, saying that "a jury must resolve the question of the sting because reasonable persons could differ on that question." *Id.* at 1084; *see also id.* at 1081, 1091.

In addition, the Eleventh Circuit in the present case recognized that its approach conflicted with that of the Fifth Circuit. Although the Eleventh Circuit stated that "most courts show less deference [than the clearly erroneous standard] when fact-finding 'rel[ies] on weighing of evidence and drawing of inferences,'" it acknowledged that the Fifth Circuit took a contrary view in *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997), holding that "no special review is accorded to 'preliminary factual issues.'" Pet. App. 17a. Indeed, both *Scalamandre* and an earlier Fifth Circuit de-

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[12] In an earlier decision, *Newton v. National Broadcasting Co.*, 930 F.2d 662 (9th Cir. 1990), *cert. denied*, 502 U.S. 866 (1991), the Ninth Circuit struggled with striking the proper balance between the First Amendment and deference to juries, noting that it was a "daunting task." *Id.* at 666. The *Newton* court recognized a "credibility exception" to independent review, but was not called upon to decide whether the preliminary questions of gist and falsity were subject to such review. *Id.* at 671.

cision, *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992), expressly limited the boundaries of *Bose* "independent review" to "the ultimate finding of actual malice," stating that there was no need to "conduct de novo review of the jury's determination of preliminary factual issues or questions of credibility." *Id.* at 46; *see Scalamandre*, 113 F.3d at 560.

3. The clear split in the circuits is not diminished by the Eleventh Circuit's suggestion that, in this case, "the gist of the report is intertwined with Levan's allegations of actual malice, which we must subject to independent review." Pet. App. 18a, n.29. The same could have been said in each of the cases discussed above. For example, in *Lundell*, the dispute over the broadcast's gist—what would a reasonable person understand "it doesn't work" to mean?—was determinative of liability. Similarly, in *Kaelin*, alternative determinations of the gist—to what would a reasonable person think the "it" in the headline referred?—would have led to different conclusions on actual malice. In *Masson*, as the *Lundell* court noted, "the Supreme Court's analysis of actual malice required it to consider the concept of falsity." 98 F.3d at 358. If independent review were applied to gist and falsity in each such circumstance, appellate courts would ultimately make *de novo* findings of most key factual questions in most defamation cases, and there would be little left of the Seventh Amendment right to trial by jury.[13]

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[13] A common defense tactic employed by ABC and other journalists has been to define a milder "gist" and insist that its producers did not mean to convey the more obvious, and more damaging, message. This was true in both *Lundell* and *Kaelin*. In addition, in *Weller v. American Broadcasting Cos.*, 232 Cal. App. 3d 991 (Cal. Ct. App. 1991), after a jury verdict, the court recognized that the broadcast "could have been understood as implying that Weller had, at worst, knowingly sold stolen property," and, as here, that the implication was conveyed, *inter alia*, by "suggesting Weller was avoiding publicity and had a guilty conscience." *Id.* at 1002. ABC argued on appeal, as in this case, that the average viewer

II. THE ELEVENTH CIRCUIT IGNORED THE INQUIRY THIS COURT PRESCRIBED IN *CONNAUGHTON*

Even if the Eleventh Circuit were correct as to the *scope* of independent review, it still erred by disregarding the instructions as to the *method* of such review this Court provided in *Connaughton*. In *Connaughton*, the Sixth Circuit, in the course of upholding a plaintiff's verdict, identified eleven facts that the jury "could have found" (findings that, according to the Sixth Circuit, would not have been clearly erroneous) and determined that those facts added up to a clear and convincing showing of actual malice. *See Connaughton*, 491 U.S. at 689-90. This Court affirmed, but chose to rest its decision on what it deemed "a less speculative ground." *Id.* at 690. This Court identified three facts that the jury "must have" found and considered them alongside the undisputed evidence in the case. *Id.* at 690-91. Under that analysis, this Court concluded that "actual malice inexorably follows." *Id.*[14]

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might have understood the broadcast to imply a less toxic core message. The *Weller* court upheld the verdict, stating that ABC's argument "misses the point." *See* note 5, *supra*.

[14] In a concurring opinion, Justice Scalia stated that the Court "is correct insofar as the critical point of deference to the jury's findings is concerned," *Connaughton*, 491 U.S. at 700 (Scalia, J., concurring in the judgment): "it accepts the jury's determination of at least the necessarily found controverted facts, rather than making an independent resolution of that conflicting testimony." *Id.* at 698. Justice Scalia favored the Sixth Circuit's approach, believing that the appellate court should "assum[e] all of the facts that could reasonably be found in favor of the plaintiff were found in favor of the plaintiff," rather than attempt to identify which facts the jury "must have" found. *Id.* at 697. Justices Kennedy and White and the Chief Justice concurred, each noting their belief that Justice Scalia's views were consistent with the Court's opinion. *Id.* at 694 (White, J., concurring), 696 (Kennedy, J., concurring). Nothing in the majority's opinion rejected those views; the majority apparently determined simply that it could affirm even when applying the more exacting "must have found" standard.

In the decision below, the Eleventh Circuit simply ignored *Connaughton*'s guidance: it never made any attempt to determine what the jury "must have" found. Had the Eleventh Circuit done so, it would have recognized that the jury must have found facts that led inexorably to actual malice. *First*, the jury must have found that the core message of the broadcast was that Mr. Levan and BFC knowingly misled their investors. *Second*, the jury must have found that, as Mr. Willson admitted, ABC knew that the gist (thus understood) was false: as Mr. Willson himself testified at trial, Mr. Willson had concluded that Mr. Levan believed "passionately" in the fairness of the transaction. From these preliminary facts alone, a finding of actual malice would inexorably follow.[15]

In *Connaughton*, it is unclear whether the majority's acceptance of only the facts the jury "must have found" as "a less speculative ground" for decision was unique to that case, causing courts to look to the facts the jury "could have found" (as Justice Scalia favored) in other cases. If the appellate court is charged with identifying the facts the jury "could have found," the array of facts that the jury could have found in the present case includes the following:

> —That Mr. Stearns, Mr. Levan, and Richard Auletta were credible, and that Mr. Willson's testimony was not credible regarding their lengthy meeting; that, even if the gist of the broadcast dealt with "fairness," Mr. Willson effectively accepted at the meeting that the transactions were indeed fair; that he said he would continue to focus on Mr. Levan because other, culpable targets were unavailable;

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[15] Indeed, actual malice follows from the Eleventh Circuit's *de novo* view of the gist: If ABC knew that Mr. Levan believed passionately in the fairness of the transaction, but presented a core message that the deal was "so bad that a viewer would believe Levan *must* have known the deal was unfair" (as the court defined that message), then ABC knew its core message was false.

that, when asked how he could broadcast information he knew to be untrue, he responded repeatedly "the truth is irrelevant" or "I don't care about the truth"; and that this repeated statement reflected not (as Mr. Willson explained and the Eleventh Circuit accepted) a desire "to provide both sides of the story," Pet. App. 21a, but, as Mr. Stearns wrote to ABC, "a reckless disregard for the truth."

—That ABC was not credible regarding its claim (wholly accepted by the Eleventh Circuit) that it could find only a "vast number of objective sources" that "condemned the rollups," *id.* at 26a; that ABC attempted to get investors to state that the transactions were unfair, and, when it failed, rejected them as sources, noting that they were "not good" and "not angry enough"; and that ABC rejected experts with contrasting views.

—That Mr. Levan's interview with ABC was canceled, not because (as the Eleventh Circuit concluded) "the parties could not agree on the ground rules for the interview," *id.* at 12a, but because, as three witnesses testified, ABC reneged on those ground rules, which had been reduced to writing; and that the broadcast's explanation of the cancellation, and the implication that Mr. Levan lied to and hid from ABC, was knowingly false.

—That ABC knew that its assertion that "the man behind it wouldn't talk to us" and the repeated implications that Mr. Levan was hiding were untrue; the jury found that Mr. Levan had talked with ABC, on the record, and requested additional meetings; and that ABC had refused to meet.

—That ABC knowingly manipulated videotape to create statements and implications never made, and to create an event that did not happen.

The Eleventh Circuit avoided the *Connaughton* analysis, and claimed that "most" of the evidence that "related to actual malice" was "undisputed." This led to the backbone of the Eleventh Circuit's opinion: its own, *de novo* factual conclusion that the transaction was unfair. The court devoted the lion's share of the beginning and end of its opinion to a recitation of the facts that ABC presented to support that conclusion. To reach the conclusion that this issue was essentially "undisputed," the court ignored literally days of evidence explaining why the exchange transactions were fair, and were designed to be fair, including the following:

—The court found that the investors gave up "valuable partnership assets" (Pet. App. 21a); but the jury heard evidence that those "assets" had lost 90% of their value, and that investors were anxious to exchange those "assets" for an instrument backed by the strength of BankAtlantic, which ultimately prospered.

—The court repeated that "BFC acquired a total of $46 million in assets . . . in the exchange" (*id.* at 4a, 6a); but the jury considered unrefuted evidence that those assets had a market value of $16 million.

—The court noted that "many [unnamed] experts questioned why Levan recommended the exchange" rather than "selling the properties on behalf of the partnership" (*id.* at 10a); but in fact *both* of ABC's trial experts testified that it would have been a breach of fiduciary duty for Mr. Levan to have sold the assets for the partnerships. 55 Tr. 3408-10; 26 Tr. 4080, 4083.

—According to the court, sources told ABC that the bonds were "junk";[16] but the jury rightfully

[16] The jury heard evidence that the term "junk" was a term of art used to describe all bonds that were "below investment grade." 38 Tr. 825. In contrast, the Eleventh Circuit wrote that "Junks

> focused on the question, "what did the investors give up for those bonds?" Only petitioners offered evidence that actually compared the bonds to what the investors gave up—not "real estate," but limited partnership certificates with a value that was plummeting daily.[17]

If the Eleventh Circuit had followed *Connaughton*, these facts not only would have been recognized in the court's opinion, but would have been accepted. Instead, they were ignored or explained away, leading to the court's mistaken conclusion that the evidence of actual malice was actually "undisputed." Pet. App. 18a, n.28.

The analysis conducted by the Eleventh Circuit is the polar opposite of the analysis that this Court conducted in *Connaughton*.[18] At the end of a seven-week trial, the

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[sic] bonds are bonds that have a high risk of nonpayment and therefore yield a high interest rate." Pet. App. 8a.

[17] The court's conclusion that "a person even mildly familiar with investments would conclude that the transactions were unfair," Pet. App. 23a, begs the question, "why would two-thirds of the investors vote in favor of it?" The evidence established that the investors needed to meet suitability requirements before being allowed to invest—and were, therefore, at least "mildly familiar with investments"—and included compelling reasons why those investors would accept the exchange. Yet the only explanation the court offered is the one that ABC proffered, an explanation the jury could reasonably have rejected: "Many of the experts were of the opinion that limited partners probably voted for the transactions because they did not read, or could not understand, the three-hundred-plus page prospectuses that disclosed the terms of the exchanges." *Id.* at 6a, n.8. This hardly reflects a view of the evidence in "a light most favorable to plaintiffs." The jury rejected the notion that the investors were either lazy or duped. The Eleventh Circuit drew its own, opposite conclusion.

[18] The Eleventh Circuit's analysis evokes the critique offered by the Sixth Circuit in *Connaughton* in reviewing the D.C. Circuit's opinion in *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir.) (*en banc*), *cert. denied*, 484 U.S. 870 (1987): "[I]t would appear that the court in fact ignored this standard and instead elected to selectively re-examine the evidence to arrive at what *the court itself* thought

jury was presented with overwhelming evidence establishing that the exchange transactions were indeed fair, that Mr. Levan certainly believed they were fair, that ABC concluded that Mr. Levan believed in the fairness of the transactions, and that ABC nonetheless broadcast a story telling America that Mr. Levan had knowingly misled his investors. Pursuant to *Connaughton*, and as part of its independent review of the record to determine whether the evidence convincingly established actual malice, the Eleventh Circuit had a duty to identify those facts. Instead of conducting its review in this manner, the court chose instead to pick and choose among the facts and view them in a light most favorable to ABC. This Court should grant certiorari to clarify that appellate courts have no license to supplant the jury so thoroughly and to conduct their independent review without regard to any constraining principle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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would be a more reasonable interpretation of the facts." *Connaughton v. Harte-Hanks Communications, Inc.*, 842 F.2d 825, 840 n.8 (6th Cir. 1988), *aff'd*, 491 U.S. 657 (1989).

APPENDIX
TABLE OF CONTENTS

	Page
APPENDIX A:	
Opinion (11th Cir. Sept. 29, 1999)	1a
APPENDIX B:	
Amended Judgment on Special Verdicts (S.D. Fla. July 30, 1997)	27a
APPENDIX C:	
Order Denying Defendants' Renewed Motion for Judgment As a Matter of Law and Defendants' Motion in the Alternative for a New Trial or Remittitur (S.D. Fla. July 21, 1997)	29a
APPENDIX D:	
Special Verdict Form As to Plaintiff BankAtlantic Financial Corporation (BFC) (S.D. Fla. Dec. 18, 1996)	31a
APPENDIX E:	
Special Verdict As to Plaintiff Alan Levan (S.D. Fla. Dec. 18, 1996)	34a
APPENDIX F:	
Instructions to the Jury (S.D. Fla. Dec. 18, 1996)	37a
APPENDIX G:	
Order Adopting Report and Recommendation (S.D. Fla. July 11, 1996)	54a
APPENDIX H:	
Report and Recommendation (S.D. Fla. Apr. 17, 1995)	58a
APPENDIX I:	
Constitutional Provisions Involved	73a

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 97-5380

ALAN B. LEVAN, an individual plaintiff,
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs-Appellees-
Cross-Appellants,

v.

CAPITAL CITIES/ABC, INC., a New York corporation,
WILLIAM H. WILLSON, an individual,
Defendants-Appellants-
Cross-Appellees.

Sept. 29, 1999

Before TJOFLAT, BLACK and CARNES, Circuit Judges.

TJOFLAT, Circuit Judge:

Appellees BFC Financial Corporation ("BFC"),[1] and its President, Chief Executive Officer, and controlling shareholder, Alan Levan, brought this action for defama-

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[1] BFC's name has changed several times since its inception. We refer to BFC and its predecessors simply as "BFC."

tion against Capital Cities/ABC, Inc. ("ABC") and one of its producers, Bill Willson. Their cause of action arose from a segment aired on ABC's television program "20/20" that portrayed BFC and Levan as unfairly taking advantage of investors in real estate related limited partnerships, by inducing them to participate in transactions known as "rollups." Appellees claimed that in its broadcast ABC made numerous false or misleading statements with actual malice, and that ABC and Willson therefore were liable for injuries that appellees suffered as a result of the story. After the jury returned a verdict in favor of appellees, awarding them significant compensatory damages, ABC and Willson renewed their motion for judgment as a matter of law made at the close of evidence.[2] The district court denied their motion and entered judgment pursuant to the jury's verdict.

ABC and Willson appeal the district court's denial of their motion for judgment as a matter of law; appellees cross-appeal the district court's refusal to instruct the jury on their claim for punitive damages. We conclude that ABC and Willson are entitled to judgment as a matter of law. The evidence, taken as a whole, was insufficient to establish one of the elements of appellees' claim: that ABC and Willson broadcast the story with actual malice. We therefore vacate the district court's judgment in favor of appellees and instruct the district court to enter judgment for appellants. Given this disposition of the main appeal, we need not consider appellees' cross-appeal.

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[2] ABC and Willson also moved the court to grant them a new trial or alternatively a remittur. Because we conclude that the district court should have granted ABC and Willson judgment as a matter of law, we neither reach nor discuss the merits of their motion for a new trial or remittur.

I.

During the early 1980s, Alan Levan and his company, BFC, were engaged in the business of organizing and managing commercial real estate limited partnerships. The idea behind these partnerships was that small investors, who individually could not raise the millions of dollars needed to invest in commercial real estate, could invest small amounts of money in these limited partnerships (averaging between $5,000 to $20,000 dollars per investor) which would then pool the investors' money and purchase commercial properties. It was anticipated that the partnerships would hold onto the properties for a period of time ranging from between four to nine years and then sell the properties and distribute the proceeds among the investors. In each limited partnership, a wholly-owned subsidiary of BFC served as the managing general partner, and Alan Levan, as well as several other individuals associated with BFC, served as individual general partners.

In the mid-1980s, however, there was a severe nationwide decline in the value of real estate. The properties held by Levan's limited partnerships were no exception, and consequently, the value of the limited partners' interests plummeted. In response to this downturn in the real estate market, Levan and BFC offered their limited partners the two exchanges that are at the center of this dispute. The two transactions, which were completed in 1989 and 1991, respectively, were of a type referred to in the industry as a "rollup." In essence, each transaction was an exchange: the limited partners gave BFC their partnership interests (that is, their real estate interests and any other assets held by the partnership), and in return the limited partners received debentures issued by

BFC.[3] The two rollups were nearly identical in form; we therefore discuss only the 1989 transaction in detail.

The 1989 exchange involved three limited partnerships (the "1989 Partnerships"). At the time of the exchange, these partnerships held properties with an aggregate appraised value of $44 million.[4] The partnerships also held approximately $2 million in cash. Thus, BFC acquired a total of $46 million in assets from the 1989 Partnerships in the exchange.[5] In return, BFC gave the limited partners debentures that had a face value of $30 million. These debentures were unsecured and subordinated, which meant that if BFC went bankrupt, the debenture holders would be the last creditors in line to be paid from BFC's assets. The debentures were to mature in 20 years (July 1, 2009). Until maturity, the debentures were to bear in-

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[3] These exchanges, although widely characterized by industry experts as rollups, were different from the typical rollup transaction. In the typical rollup, the limited partners of several partnerships are offered the opportunity to merge their partnerships together, thereby creating a new entity—either a new limited partnership or a corporation—which assumes the rights and responsibilities of the original partnerships. If the limited partners approve the rollup, then they give up their original partnership interests in return for interests in the new partnership or shares in the new corporation. In the rollups offered by BFC, in contrast, the limited partners were given the opportunity to trade their partnership interests for debentures in the managing general partner, BFC.

[4] The actual appraised value of the properties was $77.6 million. The properties, however, were encumbered by a total of $33.6 million in debt. Thus, the $44 million figure represents the net appraised value of the real estate.

[5] The limited partners originally invested a combined total of $61 million in the 1989 Partnerships. As of September 30, 1988, the limited partners had received $18.4 million in distributions as a return on their original investment. The limited partners also gained substantial tax benefits as a result of their partnership interests.

terest (paid quarterly) at 8% for the first year, 9% for the second year, and 10% thereafter. If BFC's management determined that payment of interest during any quarter would "impair the operations of [BFC]," then BFC had the right to defer interest payments for that quarter. Deferred interest was due on maturity of the debentures; such interest would accrue interest at the current interest rate of the debentures until it was paid. Further, if BFC deferred interest for a total of eight quarters, then the interest on the debentures increased to 12% until maturity. After a one-month consent period, the limited partners approved the transaction by a two to one ratio.[6]

ABC began looking into the BFC rollups in the summer of 1990. Many other limited partnerships across the nation were engaging in rollup transactions at that time, and a large number of these transactions were criticized by experts (in real estate and financial matters) as being unfair to the limited partners. After ABC received a letter from one angry investor (who had participated in a rollup unrelated to the two that BFC consummated) com-

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[6] Although the 1991 exchange was structured almost identically to the 1989 exchange, the terms that BFC offered in the 1991 exchange were even more unfavorable to the limited partners. BFC offered the 1991 exchange to four limited partnerships, which had a combined original capital investment of $112 million. At the time of the exchange, the partnerships held properties with a total appraised value of $77 million. These properties were encumbered by mortgages totaling $46 million. The partnerships also had other net liabilities of approximately $500,000. In the exchange proposed by BFC, the limited partners were to give up these assets in return for a total of $17 million in unsecured subordinated debentures. These numbers reflect the total for all four partnerships; however, only three of the four approved the transaction. The three approving partnerships received 20-year debentures which mature on July 1, 2011. Until maturity, the debentures bear interest at 10.5% for the first year, 11.5% for the second year, and 12.5% thereafter. If BFC deferred interest payments for eight quarters, then the interest rate would increase to 13% until maturity.

plaining about these exchanges, it decided to investigate and air a story about rollups on its "20/20" news program. John Stossel, a 20/20 on-air-correspondent, and appellant Bill Willson, a producer, were assigned to work on the story. As its investigation unfolded, ABC decided to focus its story on the BFC rollups.

In the course of its investigation, ABC turned to a wide variety of sources, including congressional staff members, limited partnership experts, and securities analysts. ABC attended a hearing before the Securities and Exchange Commission, as well as numerous congressional hearings, including one hearing specifically dedicated to investigating the BFC rollups.[7] These sources almost uniformly criticized the rollups as being grossly unfair to the limited partners.[8]

First, ABC's expert sources criticized the value of the debentures that the limited partners received. Although BFC acquired $46 million in properties and cash from the 1989 Partnerships, it exchanged those assets for only $30 million in debentures.[9] The experts condemned this re-

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[7] Levan appeared at this hearing and testified in defense of the 1989 and 1991 transactions.

[8] Many of these experts were of the opinion that limited partners probably voted for the transactions because they did not read, or could not understand, the three-hundred-plus page prospectuses that disclosed the terms of the exchanges.

[9] BFC explained in its prospectus that this difference accounted for the following:

> [T]he uncertainties of the appraisal process . . . [,] because there is no assurance that the assets of the [partnerships] could ultimately be sold for [$46 million] . . . [, because] the appraised values do not take into account the costs to be incurred upon sale of the properties . . . [and because the appraised values are not] discounted in light of the fact that the sale of real properties to third parties typically involves a sale on terms pursuant to which a portion of the purchase

duction in the value of the limited partners' interest (which amounted to 34.7% of the net value of the partnerships' assets) as unjustified. Further, these experts pointed out, not only was the face value of the debentures too low, but the actual market value of the debentures was even lower. The market value of a debenture depends primarily on the market's perception of the financial stability of the issuing company—that is, the bonds are not highly valued if there is a significant risk that the issuer will not be able to pay the interest or the principal. In BFC's case, the market perceived BFC's debentures as a poor investment. During 1988 and 1989, BFC suffered losses of $4.4 million and $6.9 million, respectively. These losses were due to the weak financial condition of its primary asset, a savings and loan called BankAtlantic.[10]

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price is paid to the seller in installments or otherwise over a period of time.

BFC did include in the terms of the deal a method of compensating the limited partners in case it sold the properties that it gained in the exchange for more than $30 million. If BFC netted more than that amount (adjusted based on a complex formula that took various factors into account such as the cost of the real estate sales) from the sale of the properties, then BFC was required to pay the investors as "additional consideration" 100% of the amount over $30 million. BFC could pay this consideration in either cash or additional debentures. Although this feature of the transaction might appear to be favorable to the limited partners, ABC's objective expert sources thought it was extremely unlikely that BFC would be required to pay any additional consideration. BFC was desperately in need of cash when the rollup was consummated; thus, BFC anticipated that it would sell the properties as quickly as possible. Because BFC needed to sell the properties quickly, it most likely would be forced to sell the real estate at prices substantially below their appraised value. In fact, these experts turned out to be correct; BFC sold ten of the fourteen properties within two years of the exchange but paid no "additional consideration" to the limited partners.

[10] In 1989, BFC owned 53.4% of BankAtlantic, and the bank represented 98% of BFC's assets. BFC's interest in BankAtlantic grew to 70.1% by the time of ABC's broadcast in 1991.

Between 1988 and 1990, BankAtlantic sustained aggregate losses of $17.8 million. As a result of BFC's and BankAtlantic's financial woes, there was almost no market for the debentures.[11] When buyers could be found, the debentures traded for as low as 21% of their face value. Thus, the limited partners, who gave up $46 million in assets, ended up with debentures that had a market value of only about $6 million.

In light of the high risk that BFC would be unable to pay either the interest or the principle on the debentures, experts uniformly agreed that the debentures were "junk bonds"—in fact many experts characterized the debentures as worse than junk bonds. Junks bonds are bonds that have a high risk of nonpayment and therefore yield a high interest rate. Many experts opined to ABC that in light of BFC's shaky financial condition, the debentures should have carried a much higher rate of interest. The interest rate for the debentures issued in the 1989 transaction was 8% for the first year, 9% for the second year, and 10% thereafter. This rate was lower than the Prime Rate (the rate that banks charge to their most creditworthy customers), which was 11% on the day that BFC issued its prospectus for the 1989 transaction.[12]

When compared to what the limited partners received, namely, debentures that the market valued at about $6

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11 The debentures were not quoted on NASDAQ or listed on any exchange; to the extent that they were traded, they were sold on so-called "yellow sheets," which are wholesale quote sheets used by dealers.

12 We take judicial notice of the Prime Rate on February 14, 1989, the date on which BFC issued its prospectus. This figure was provided by the Federal Reserve Board, and cannot reasonably be disputed. *See* The Fed. Reserve Bd., *Federal Reserve Statistical Release* (visited Sept. 8, 1999) <http://www.bog.frb.fed.us/releases/H15/data/d/prime.txt>.

million, ABC's expert sources pointed out, BFC fared quite well in the 1989 exchange. Of the fourteen properties that BFC gained in the exchange, by 1991 BFC had sold ten of the properties for a net gain of $16 million. Thus, adding in the approximately $2 million in cash that BFC acquired from the partnerships, BFC gained $18 million in cash as well as the four remaining unsold properties.

The low value of the debentures was hardly the only criticism that the experts leveled at the transactions. A second criticism was that there were serious negative tax implications for the limited partners arising from the exchanges. For instance, some limited partners may have realized a taxable gain from the exchanges even though they received no cash distribution with which to pay the taxes. Further, although BFC had the right to defer interest payments on the debentures (and in fact did defer all interest payments after December 1991), the limited partners had to pay taxes each year on the deferred interest, as if it constituted ordinary income, even though they received no money to pay the taxes.[13]

A third criticism that the experts directed towards the exchanges was that an investor who voted against the transaction had no right (under the terms of the limited partnership agreements) to opt-out and receive the ap-

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13 The serious consequences of BFC's right to defer interest payments is demonstrated by what actually happened. As stated above, BFC deferred all interest payments on the debentures after December 1991. If BFC decided to continue deferring the payments until the bonds matured in 2009, the limited partners who participated in the 1989 exchange would be required to report as ordinary income (for federal income tax purposes) the deferred interest every year between 1992 and 2009. Thus, in 1992, for example, the limited partners were treating as ordinary income money they might not receive for eighteen years.

praised value of his interest.[14] Thus, investors, who bought into one of the 1989 Partnerships and anticipated that their investment would be returned in four to nine years, had no choice but to accept bonds that would not mature until 2009.[15]

Fourth, ABC's expert sources widely criticized the exchanges because of Levan's significant conflicts of interest. Levan was a general partner of each of the limited partnerships, President and controlling shareholder of BFC, and Chairman of BankAtlantic. Given that BFC was able to sell, within two years of the exchange, ten of the properties that it acquired from the 1989 Partnerships for $16 million, many experts questioned why Levan recommended the exchange to the limited partners rather than foregoing the exchange and selling the properties on behalf of the partnerships. That way, the limited partners would have ended up with $18 million in cash ($16 million from the sale of the properties and $2 million in cash), plus four properties, rather than debentures valued on the market at about $6 million.

A number of experts concluded that Levan devised the exchanges in order to infuse capital into BankAtlantic, BFC's cash-starved savings and loan. BankAtlantic sustained substantial net losses each year from 1988 to 1990, and by the end of 1990, it was unable to meet its capital requirements. Many experts told ABC that Levan's strategy to keep the bank afloat was to consummate the ex-

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[14] Congress later enacted legislation that prohibited rollup transactions that did not provide appraisal rights to dissenting investors. *See* Limited Partnership Rollup Reform Act of 1993, Pub.L. No. 103-202, § 303(a)(12)(A), 107 Stat. 2344, 2364 (1993).

[15] The lengthy period of time before the debentures matured would be particularly troubling to elderly investors who undoubtedly did not want to wait twenty years to get their money back.

changes, quickly sell the acquired real estate for cash, and infuse the proceeds into the bank. As evidence, these experts pointed to the fact that between 1989 and 1991 BFC infused a total of $9.4 million. Although BFC's investment enabled the bank to comply with its capital requirements by early 1991, the Director of the Office of Thrift Supervision, Department of the Treasury, testified before Congress that without the money that BFC put into the bank, it would not have met the capital requirements.[16] In the words of a congressional staff member who testified at the same hearing, "The rollups . . . apparently are intended to provide the means by which the bank and holding company will survive. In the conflict between Mr. Levan's fiduciary responsibilities . . . , the needs of the bank appear to have prevailed over his responsibility to the partnerships." *See The Rollup of Real Estate Limited Partnerships, by the BankAtlantic Financial Corp.: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 102d Cong. 8 (1991) (statement of Thomas C. Montgomery, minority counsel).

A fifth criticism that experts made was directed only towards the 1991 exchange. In that exchange, BFC discounted by 10% the appraised value of the real estate held by the partnerships. BFC explained (in its prospectus to the limited partners) that this discount was necessary in order to account for the costs and expenses it

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[16] The Director of the Office of Thrift Supervision was not alone in this opinion. Thomas Montgomery, minority counsel of the Committee on Energy and Commerce testified before Congress that the bank was dependent on BFC to meet its capital requirements, and that "[w]ithout the rollups, [BFC] would not have had the capital it needed to finance the bank." *See The Rollup of Real Estate Limited Partnerships, by the BankAtlantic Financial Corp.: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 102d Cong. 7 (1991).

would incur in selling the properties. ABC's expert sources viewed this discount as unfair because the costs that BFC incurred in selling the real estate it acquired in the 1989 transaction averaged only 2.5% of the appraised value of the property—nowhere near 10%.

Although the wide array of objective experts whom ABC contacted (or otherwise heard from through publications, Congressional testimony, or testimony before the SEC) uniformly condemned the rollups as unfair, these experts were not the only sources ABC used in composing its broadcast. ABC was present when Levan testified before Congress regarding the rollups and obtained a transcript of his testimony. It also had substantial interaction with BFC, and, specifically, with Levan himself. He provided information, documents, and videotapes, about the rollups.

The parties interaction included a five to six hour off-camera discussion between Willson and Levan.[17] ABC negotiated with Levan for months in order to obtain an on-camera interview with him that it could use in the broadcast. Such an interview never took place, however, because Levan and ABC could not agree on the ground rules for the interview; as a substitute, Levan sent ABC a videotape which he prepared and on which he answered specific questions about the rollups. ABC aired parts of this tape during its broadcast.

ABC broadcast its report on the BFC rollups, which it titled "Too Good to Be True," on November 29, 1991.[18] Although the broadcast expressly stated that the rollups

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[17] The parties disagree as to whether this discussion was on or off the record.

[18] ABC's 20/20 program is a one hour television show that airs weekly. ABC's story about the BFC rollups was one of three stories that aired on 20/20 that evening.

were legal, it was very critical of the fairness of the transactions to the limited partners.[19]

II.

In February 1992, Levan and BFC filed this lawsuit against Willson and ABC in the United States District of Southern District of Florida, alleging false light invasion of privacy[20] and defamation.[21] Levan and BFC alleged that ABC made a number of false statements or implications in the broadcast. The most damaging of these were that (1) ABC falsely implied that Levan had refused any contact with ABC, and, therefore, that he had something to hide; (2) in broadcasting parts of the

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[19] The broadcast revealed the terms of the transactions, and focused specifically on the low market value of the debentures. It also included, *inter alia*, interviews with limited partners who voted against the exchanges, and videotape excerpts of the congressional hearings on the BFC rollups.

[20] At trial, at the close the evidence, the district court dismissed the false light claim against both Willson and ABC. The court held that the false light and defamation claims were duplicative and thus not separately actionable under Florida law. The appellees have not challenged this ruling in their cross-appeal.

[21] Discovery ensued, but trial was delayed while ABC and Willson attempted to intervene as interested parties in a class action lawsuit of limited partners against Levan and BFC. This suit, *Purcell v. BankAtlantic Fin. Corp.*, 89-1284-CIV (S.D.Fla.), was a consolidation of three separate class action lawsuits brought by the limited partners who voted against the 1989 transaction. The plaintiffs alleged that Levan and BFC had violated federal securities laws and sought damages and rescission of the debentures. A jury found for the plaintiffs and awarded $8 million in damages. Before the case could be appealed, the parties reached a settlement whereby BFC and Levan agreed to pay the amount awarded by the jury and in exchange the parties agreed to vacate the judgment. In order to preserve the collateral estoppel effect on the present case, ABC filed a motion to intervene in *Purcell*, in effect to prevent the vacatur. That motion was denied, and this Court affirmed. *See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508 (11th Cir.1996).

videotape Levan had sent ABC, ABC altered some of the lead-in questions and took some of Levan's statements out of context, thus creating false impressions about the rollup; and (3) ABC portrayed statements made by a member of Congress at a congressional hearing in such a way as to create false impressions about events at that hearing. The underlying allegation was that ABC had manipulated interviews and other footage to create the false impression that Levan had deliberately set out to defraud his investors.[22]

The case went to trial in late 1996. The trial lasted seven weeks. The jury found against ABC and Willson and awarded $1.25 million to BFC and $8.75 million to Levan in compensatory damages.[23] The district court de-

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22 On January 10, 1992, ABC broadcast three corrections to the report, which were read on the air by 20/20 anchorman Hugh Downs. First, ABC admitted that it had overstated the value of one of the real estate properties exchanged in the roll-up because ABC had not taken into account a substantial mortgage on the property. Second, ABC clarified its statement in the report that Levan "wouldn't talk to us." ABC admitted that, although the two sides could not agree on the ground rules for an on-camera interview, Levan had communicated with ABC in various ways, including sending it a videotape where Levan answered questions he thought ABC would ask. Finally, ABC admitted that its use of portions of this videotape may have mislead viewers: "Portions of that tape were aired, although our editing of that material may have lead some viewers to believe that money and property were transferred directly from a group of investors to Mr. Levan personally. Well, any such impression was inadvertent and erroneous and we're sorry if there was any misunderstanding of this kind." While these corrections may be relevant to the issue of damages, the fact that ABC made them does not constitute clear and convincing evidence ABC acted with actual malice at the time it broadcast its report.

23 In their complaint, Levan and BFC also sought punitive damages. At the close of appellants' case, the district court dismissed the claim for punitive damages on the ground that the appellants had produced insufficient evidence for a jury reasonably to con-

nied appellants' post-verdict renewed motion for judgment as a matter of law, or in the alternative for a new trial or remittur of damages. On appeal, ABC and Willson contend that the trial court erred in not granting their motion for judgment as a matter of law because, *inter alia*, Levan and BFC did not produce clear and convincing evidence of actual malice.[24] We agree.

III.

Because this case involves a public figure plaintiff,[25] and the broadcast was a matter of public concern, Levan and BFC are required to prove not only that the statements alleged were defamatory and false, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-77, 106

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clude that ABC and Willson had acted with the primary purpose of "ill will, hostility, and attempt to defame" as required under Florida law. Levan and BFC have challenged the court's ruling in their cross-appeal, arguing that the court erred in dismissing their claim for punitive damages. Because we direct that judgment be entered for appellants, we do not reach the cross-appeal.

[24] ABC and Willson contend that the district court committed other errors during the prosecution of the case. They contend that the district court erred in not admitting evidence of the jury verdict in *Purcell v. BankAtlantic Fin. Corp.*, 89-1284-CIV (S.D.Fla.) *see supra* n. 21, and surrounding publicity to mitigate any injury to reputation suffered by Levan and BFC. They also contend that the trial court erred in applying the appropriate burden of proof to the element of falsity and in refusing to hold that the broadcast as a whole was protected opinion. Finally, they contend that the jury's damages award was excessive and cannot be sustained as a matter of law. Because we find that judgment must be entered for ABC and Willson on the issue of actual malice, we do not reach these claims of error.

[25] The district court held prior to trial that Levan and BFC were public figures and thus (in addition to establishing by a preponderance of the evidence that the 20/20 story was false) had to prove by clear and convincing evidence that ABC and Willson acted with actual malice to recover. *See New York Times v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). Levan and BFC do not challenge the public figure finding on appeal.

S.Ct. 1558, 1563-64, 89 L.Ed.2d 783 (1986), but also that ABC acted with "actual malice," *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 726, 11 L.Ed.2d 686 (1964). A showing of actual malice may be made by showing that the defendant published the defamatory statement either "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280, 84 S.Ct. at 726. Actual malice requires more than a departure from reasonable standards of journalism; "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). A public figure is required to prove actual malice by clear and convincing evidence. *See Morgan v. Tice*, 862 F.2d 1495, 1500 (11th Cir.1989) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974)).[26]

Our standard of review in libel cases in which the actual malice standard forms part of the jury charge is higher than in other cases. We are required to make an "independent examination of the entire record," *New York*

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[26] Neither the Supreme Court nor this Court have expressly decided whether the plaintiff must prove falsity by clear and convincing evidence or simply a preponderance. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 661 n. 2, 109 S.Ct. 2678, 2682 n. 2, 105 L.Ed.2d 562 (1989). *But cf. Morgan*, 862 F.2d at 1500 (stating in dicta that both falsity and actual malice require clear and convincing proof). The Ninth Circuit, among others, has concluded that preponderance is sufficient. *See Rattray v. City of Nat'l City*, 51 F.3d 793, 801 (9th Cir.1994). Florida's model jury instructions for libel also require simple preponderance. *See In re Standard Jury Instructions*, 575 So.2d 194, 200 (Fla.1991). Because we find that there was not clear and convincing proof of actual malice at trial, we decline to address this issue.

Times, 376 U.S. at 285, 84 S.Ct. at 729, to determine whether the evidence offered at trial supports a finding of actual malice. There is, however, some confusion on how this review relates to factual findings made by the jury. The Supreme Court reiterated in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989), that credibility determinations are reviewed under a clearly erroneous standard because of the jury's " 'opportunity to observe the demeanor of the witnesses,' " *id.* at 688, 109 S.Ct. at 2696, (quoting *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499-500, 104 S.Ct. 1949, 1958-59, 80 L.Ed.2d 502 (1984)). Most courts show less deference when factfinding "rel[ies] on weighing of evidence and drawing of inferences." *Newton v. National Broad. Co.*, 930 F.2d 662, 671 (9th Cir.1990); *see also Christ's Bride Ministries, Inc. v. Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir.1998), *cert. denied*, —— U.S. ——, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999). *But see Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556, 560 (5th Cir.1997) (holding no special review is accorded to "preliminary factual issues"). In any event, a *de novo* review of the entire record is not required; we must only satisfy ourselves that the evidence is sufficient for a finding of actual malice.[27] *See Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1120-21 (11th Cir.1992) (holding that the purpose of First Amendment independent review is "to guarantee that the jury imposed no greater burden [on the defendant] than the Constitution permits").

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[27] We recognize, therefore, that the law is unsettled as to the deference that we give to "facts" found by the jury. In this case, however, most of the crucial evidence that relates to the actual malice element is undisputed: specifically, the overwhelming evidence that ABC had to support the broadcast's conclusion that the rollup was unfair to the limited partners.

Under Florida law, a statement is not defamatory unless the "gist" or "sting" of the statement is defamatory. *See Smith v. Cuban Am. Nat'l Found.*, 731 So.2d 702, 706 (Fla. 3d DCA 1999). The gist of any statement within a publication or broadcast is found only by reference to the entire context. *See Byrd v. Hustler Magazine Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983). If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice. *See Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433, 115 L.Ed.2d 447 (1991). Our first job, therefore, is to determine the gist [28] or sting of the report.[29]

The parties have vehemently disagreed about the gist of the ABC report. Appellants argue that the gist was merely that the rollups were unfair, which the broadcast demonstrated by juxtaposing the undervalued debentures that

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[28] In using the term "gist," we do not mean to confuse the issue at hand. *Cf. Bressler v. Fortune Magazine*, 971 F.2d 1226, 1237 (6th Cir.1992) (Batchelder, J., dissenting). "Gist" is a term typically associated with the common law defense of substantial truth, the burden of which lies with the defendant. In a public figure libel action, the burden of proving that a statement is false lies with the plaintiff. The parties in this case agree that we must determine what the report, taken as whole, is actually alleging about Levan, and then determine if ABC broadcast that meaning with actual malice. We use "gist" as shorthand for this concept, although it might be more accurate, if somewhat clumsy, to ask what is the " 'effect on the mind of the reader.' " *Masson*, 501 U.S. at 517, 111 S.Ct. at 2433 (quoting R. Sack, *Libel, Slander, and Related Problems* 138 (1980)).

[29] We recognize that the "gist" or "sting" of an alleged defamatory statement is a factual question. In this case, however, the gist of the report is intertwined with Levan's allegations of actual malice, which we must subject to independent review. *See Braun*, 968 F.2d at 1120-21. Unlike other factual findings, ascertaining the gist does not depend on resolving credibility issues, which are better left to the factfinder. *See Connaughton*, 491 U.S. at 688, 109 S.Ct. at 2696.

the limited partners received with Levan's financial success after the transactions were completed. Appellees, on the other hand, maintain that the gist of the broadcast was that Levan *knowingly* misled the limited partners into accepting the rollup transaction, thereby benefitting himself, BFC, and BankAtlantic.[30] This implication, appellees argue, follows from ABC's "hiding" theme: because the broadcast presented Levan as refusing to speak with ABC on camera, ABC implied that he had something to hide.

We conclude that the answer is somewhere in between: ABC clearly implied that the limited partners got a raw deal, one so bad that a viewer would believe Levan *must* have known that the deal was unfair to his limited partners, particularly in light of his financial expertise.[31] ABC on camera, ABC implied that he had something to apparent when viewing the report as a whole. ABC made numerous references to the devaluation of the debentures the investors received, including that they had lost around 80% of their face value. One of Levan's former business partners stated on camera that the trans-

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30 This gist is important to appellees' argument because much of their proffered evidence of actual malice consists of various statements by ABC employees that they believed that Levan thought the transaction *was* fair. If the gist of the broadcast was, as appellees contend, that Levan knowingly misled his investors, then these statements tend to demonstrate that appellants entertained serious doubs that the gist of their story was true.

31 Appellees point to a number of statements or images contained in the broadcast that, according to them, are false or misleading. Whether or not these statements or images convey a false message to the viewer, however, does not alter the gist of the story, which was that the deals were grossly unfair—so much so that Levan must have known they were unfair. *See Masson*, 501 U.S. at 517, 111 S.Ct. at 2433 (stating that minor inaccuracies do not affect the substantial truth of a publication).

action was done "only for the benefit" of Levan. The report acknowledged that Levan's prospectus disclosed both the particulars of the transaction and Levan's conflicts of interest, but it also depicted limited partners and a member of Congress stating that the prospectus was too long and complicated for an average investor to understand.[32]

Having ascertained the gist of the story, it is next incumbent upon us to determine, by making an independent review of the record, whether appellees established actual malice by clear and convincing evidence. We conclude that the proof was insufficient to show that ABC "entertained serious doubts" that the underlying thrust of the broadcast was true. As we have said, most of the evidence that related to actual malice was undisputed: the numerous experts ABC consulted, the views of the limited partners ABC interviewed, the testimony given at the Congressional hearing on Levan's rollup, and most importantly, the terms of the transaction itself.

In concluding that appellees failed to establish a case of actual malice, we have not overlooked the pieces of evidence that, appellees contend, demonstrated a reckless disregard by ABC for the truth of the broadcast. Most of this evidence consists of (1) statements made by Willson (to Levan or his attorney) in an attempt to

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32 On the other hand, Levan was not left out to dry; the broadcast acknowledged that the transaction was legal, and that the devaluation of the limited partnerships' real estate holdings was caused by a volatile market and changing tax laws, not Levan. Further, ABC showed Levan defending himself. ABC aired a tape of Levan answering this exact question: a voice-over asked if the deal was "fair," and Levan answered, "A majority of the partners voted to accept more risk for the possibility of greater return. I think they made the right decision."

secure an on-camera interview with Levan,[33] and (2) ABC's use of the videotape Levan provided in which he answered questions that Willson had informed him would be covered if Levan consented to a on-camera interview.[34] Taken as a whole this evidence pales in contrast to the numerous sources who told ABC that Levan had given the limited partners practically worthless junk bonds in return for valuable partnership assets, in violation of his fiduciary duty as general partner.

Before ABC broadcast its report, Willson and others spoke with numerous objective experts who uniformly

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[33] For example, Willson made a number of statements to Levan such as "I don't care about the truth," or "the truth is irrelevant to me." In response, Willson explained (before the jury) that he merely meant that it was not his job to broadcast the truth, but to provide both sides of a story and let the viewer decide which to accept.

[34] ABC eventually used the videotape in the broadcast, with a disclaimer that it had been provided by Levan. The videotape was made by a professional media consultant, using a list of questions Willson had provided Levan's attorney. Appellees' main evidence of actual malice was that, in the broadcast, ABC altered one of the questions; the question presented in the broadcast was slightly different from the one Levan answered. The question ABC posed to Levan asked whether he had conflicts of interest in the transaction. In the broadcast, ABC changed the question to, "[i]sn't keeping the real estate for [your]self a conflict of interest?" Although the question that ABC aired was different (and may have incorrectly implied that Levan, not BFC, owned the real estate after the rollup), it was only slightly so—the question, and the answer, was at heart about whether it was fair for Levan to be on both sides of the transaction. *See St. Surin v. Virgin Islands Daily News Inc.*, 21 F.3d 1309, 1316 (3d Cir.1994) ("Minor inaccuracies regarding factual information will not make an article untrue and libelous so long as the statement would not materially mislead the reader."); *Smith v. Cuban Am. Nat'l Found.*, 731 So.2d 702, 706 (Fla. 3d DCA 1999). The answer aired is the one Levan has always given—that there were conflicts of interest but that they were adequately disclosed in the prospectus given to the limited partners.

condemned the 1989 transaction as unfair, particularly in light of the low market value of the debentures. Spencer Jeffries, an expert on limited partnerships who testified at trial, wrote a lengthy report concluding that the debentures BFC issued were worth much less than their face value, and that the entire transaction was done to save the cash-poor BankAtlantic. During its investigation, ABC interviewed a limited partnership expert on-camera. In the interview, which was admitted at trial, the expert said that had he been one of appellee's limited partners, he would not have voted for the transaction. Willson testified that after the story was written but prior to the broadcast, ABC double-checked with numerous securities analysts to confirm the report's conclusion that the bonds were essentially "junk." All agreed that the bonds were junk; moreover, they said they would advise their clients not to buy the bonds. Stossel testified that he spoke with three other industry professionals to confirm that the bonds were worth much less than face value.

ABC also attended congressional hearings investigating rollup transactions, including one hearing that specifically investigated the BFC rollups.[35] *See The Rollup of Real Estate Limited Partnerships, by the BankAtlantic Financial Corp.: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce,* 102d Cong. (1991). At least three Congressmen offered unfavorable opinions of the rollup. Two congressional staff members testified that the bonds had declined significantly in value and that the interests of the limited partners had been subordinated to the needs of

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35 Levan testified at the hearing and defended the rollups. ABC was unable to include his testimony in its broadcast because Levan invoked a congressional rule that permits a witness to insist that his testimony not be recorded by the media.

BFC and BankAtlantic. Thomas Ryan, the Director of the Office of Thrift Supervision, testified that BankAtlantic was a "troubled" institution, *id.* at 32, and James Doty, General Counsel of the Securities and Exchange Commission, testified that the bonds, being unsecured and speculative, were currently worth as low as 14.3% of the appraised value of the properties that BFC acquired in the 1989 exchange, *id.* at 66.

Finally, ABC had before it the terms of the 1989 and 1991 transactions, which a person even mildly familiar with investments would conclude were unfair to the limited partners.[36] In the 1989 transaction, the partnerships exchanged real estate appraised at $44 million and $2 million in cash for unsecured subordinated bonds with a face value of $30 million, not due for 20 years. Moreover, the terms of the deal allowed BFC to defer interest payments until the bonds matured. Given BFC's financial difficulties, the interest rate the debentures provided was far below the rate necessary to enable the bonds to trade near face value. The specified interest rate was so low that, by the time of ABC's broadcast, the market for the debentures had collapsed. The 1991 transaction was nearly identical in structure to the 1989 transaction but provided for an even greater "discount" in the exchange rate between the partnerships' assets and the debentures. Of course, permeating both transactions were Levan's substantial conflicts of interest: he was on both sides of the fence as a general partner on one side and a part-owner and officer of BFC and BankAtlantic on the other.

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[36] On cross-examination at trial, both Levan and his expert, Steven Goldstein, admitted that a reasonable investor might conclude that the roll-ups were unfair, even though that was not their personal view. Levan's counsel repeated this admission in his closing argument to the jury.

While ABC was investigating the rollups, Levan recommended that it interview Steven Goldstein, an expert in limited partnerships. Goldstein, who testified at trial, believed that the BFC rollups were fair, given the troubled real estate market and the consequent declining value of the limited partnerships' real estate assets. ABC did not interview Goldstein; this decision, according to appellees, evidenced actual malice on ABC's part. ABC also failed to interview on-camera any limited partner who voted in favor of the 1989 rollup. This, appellees contend, showed that ABC entertained serious doubts as to the unfairness of the transaction. Appellee's argument flows from the Supreme Court's decision in *Connaughton,* affirming a jury verdict for libel in part on evidence that a newspaper declined to interview a key witness. 491 U.S. at 692-93, 109 S.Ct. at 2698-99. But the salient facts in *Connaughton* presented a very different case.

In *Connaughton,* the newspaper used a single source as the basis for a highly improbable story that a candidate for judicial office had offered a bribe. *See id.* at 691-92, 109 S.Ct. at 2697-98. According to the source, the candidate had offered her and her sister a bribe (in the form of employment) during a conversation in his home at which five other people were present. Before it published the story, the newspaper spoke with the candidate, who had tape recorded the conversation, and the five other witnesses, all of whom squarely contradicted the source. The newspaper, however, neglected to listen to the tape recording, which the candidate made available. It also neglected to contact the source's sister, whom the source said would corroborate her version of the event. Under these facts, the Supreme Court held that the plaintiff had met his burden of establishing actual malice by clear and convincing evidence. *See id.* at 691-93, 109 S.Ct. at 2697-99.

The instant case is precisely the opposite of *Connaughton*. ABC had numerous sources telling it that the rollups were grossly unfair for the limited partners. *See Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 411-12 (6th Cir. 1991) (distinguishing *Connaughton* on the ground that the article at issue was supported by the "overwhelming number of sources"). Given these sources, ABC was not required to continue its investigation until it found *somebody* who would stand up for Levan. *See Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir.1992). The law only required that ABC not proceed to publication while entertaining "serious doubts" as to the truth of the broadcast. *St. Amant*, 390 U.S. at 731, 88 S.Ct. at 1325.

ABC's choice not to include statements by limited partners voting for the transaction is similarly irrelevant. The decision to air the interview of one person but not another is at heart an editorial decision. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730 (1974); *Newton v. National Broad. Co.*, 930 F.2d 662, 685-86 (9th Cir.1990). ABC did acknowledge in its report that a majority of investors voted for the rollup; it was not required, however, to make this point as strongly as Levan would have. We came to a similar conclusion in *Silvester v. American Broad. Co.*, 839 F.2d 1491 (11th Cir.1988), which also involved ABC and the program 20/20. During the broadcast, ABC opined that one of its sources was " 'a man with an axe to grind.' " *Id.* at 1498. The plaintiff claimed that this comment was insufficient; ABC should have informed its viewers that the source was unreliable. We disagreed, holding that ABC's comment was sufficient to alert viewers that the source "was not an unimpeachable source of information." *Id.*

It may be, as appellees contend, that there are meritorious reasons why a limited partner would have voted for the rollups. It may also be that Levan and his attorney presented some of these reasons to ABC in their off-camera meetings. Stossel implicitly acknowledged as much; the report ended with Stossel telling anchorman Hugh Downs that some investors had made money from limited partnerships but then asking rhetorically whether it was worth the risk. The conclusion that it may not have been worth the risk is "not something that could be easily proved or disproved by the testimony of one individual," *Perk*, 931 F.2d at 412, and "[d]ifference of opinion as to the truth of a matter . . . does not alone constitute clear and convincing evidence that the defendant acted with a knowledge of falsity or with a 'high degree of awareness of . . . probable falsity.'" *Connaughton*, 491 U.S. at 681, 109 S.Ct. at 2693 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 216, 13 L.Ed.2d 125 (1964)).

In sum, the evidence in the record before us, when considered in the light most favorable to appellees, was insufficient to demonstrate the existence of actual malice by clear and convincing evidence. In view of the vast number of objective sources who condemned the rollups as unfair to the limited partners, we conclude as a matter of law that ABC did not entertain serious doubts that the gist of its broadcast was true.

IV.

For the foregoing reasons, we VACATE the district court's judgment in favor of BFC and Levan, and REMAND the case with the instruction that the district court enter judgment in favor of Willson and ABC.

SO ORDERED.

APPENDIX B

[Filed July 30, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida Corporation,

Plaintiffs,

v.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,

Defendants.

AMENDED JUDGMENT ON SPECIAL VERDICTS

This action came on for trial before the Court and a jury, Honorable C. Clyde Atkins, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

(1) that the Plaintiff, Alan B. Levan

(a) recover of the Defendant, American Broadcasting Companies, Inc., the sum of $8,250,000.00, with interest thereon at the rate of 5.45% as provided by law, and his costs of action;

(b) recover of the Defendant William H. Willson, the sum of $500,000.00 with interest thereon at the rate of 5.45% as provided by law, and his costs of action; and

(2) that the Plaintiff BankAtlantic Financial Corporation

(a) recover of the Defendant, American Broadcasting Companies, Inc., the sum of $1,000,000.00 with interest thereon at the rate of 5.45% as provided by law, and its costs of action;

(b) recover of the Defendant William H. Willson the sum of $250,000.00, with interest thereon at the rate of 5.45% as provided by law, and its costs of action;

(3) the Judgment on Special Verdicts entered December 18, 1996 (D.E. No. 612) is hereby vacated.

Clerk of the Court, Carlos Juenke

By: /s/ Anita Greer-Dixon
As Deputy Clerk
ANITA GREER-DIXON

APPENDIX C

[Filed July 21, 1997]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,

Plaintiffs,

v.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,

Defendants.

ORDER DENYING DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND DEFENDANTS' MOTION IN THE ALTERNATIVE FOR A NEW TRIAL OR REMITTITUR (D.E. #627)

THESE MATTERS are before the Court on Defendants', Capital Cities/ABC, Inc., and William H. Willson, Renewed Motion for Judgment as a Matter of Law and Defendants' Motion in the Alternative for a New Trial or Remittitur (D.E. #627). On July 16, 1997 at 10:30 a.m., the Court heard oral arguments on Defendants' Renewed Motion for Judgment as a Matter of Law and Defendants' Motion in the Alternative for a New Trial or Remittitur (D.E. #627). At the completion of that hearing, the Court, being fully informed of all relevant

issues and having had reviewed and researched Defendants' Motion/Reply and Plaintiffs' opposition thereto in conjunction with applicable law, announced a finding that there was evidence to support the verdict, and thereupon ruled from the bench. This order serves to memorialize that ruling. Accordingly, it is

ORDERED AND ADJUDGED that:

1) Defendants', Capital Cities/ABC, Inc., and William H. Willson, Renewed Motion for Judgment as a Matter of Law (D.E. #627) is hereby *DENIED*;

2) Defendants', Capital Cities/ABC, Inc., and William H. Willson, Motion in the Alternative For a New Trial (D.E. #627) is hereby *DENIED*;

3) Defendants', Capital Cities/ABC, Inc., and William H. Willson, Motion in the Alternative For a Remittitur (D.E. #627) is hereby *DENIED*; Although this Court has previously closed this case, any motions that may still be pending are hereby *DENIED AS MOOT*.

DONE AND ORDERED in Miami, Florida, this 21st day of July, 1997.

/s/ C. Clyde Atkins
Senior United States District Judge

APPENDIX D

[Filed Dec. 18, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,

Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,

Defendants.

SPECIAL VERDICT FORM AS TO PLAINTIFF BANKATLANTIC FINANCIAL CORPORATION (BFC)

We, the jury, unanimously make findings of fact as a special verdict pursuant to Rule 49(a) of the Federal Rules of Civil Procedure in the form of answers to the following questions:

Question 1

Has Plaintiff BankAtlantic Financial Corporation proved by the greater weight of the evidence that the gist of the broadcast was false?

Yes ✔

No —

(If your answer to Question 1 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 1 is "Yes", proceed immediately to Question 2)

Question 2

If your answer to Question 1 is yes, has BankAtlantic Financial Corporation proved by clear and convincing evidence that ABC published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 2 is "No", proceed immediately to Question 4, *do not* answer question 3. If your answer to Question 2 is "Yes", proceed immediately to Question 3)

Question 3

If your answers to Questions 1 and 2 are yes, please set forth the amount of damages, if any, that ABC should pay BankAtlantic Financial Corporation for:

a. Past Compensatory Damages:
$1,000,000.00

b. Future Compensatory Damages (reduced to present value)——

$ ————————

(After answering Question 3, proceed immediately to Question 4)

Question 4

If your answer to Question 1 is yes, has BankAtlantic Financial Corporation proved by clear and convincing

evidence that Mr. Willson published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 4 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 4 is "Yes", proceed immediately to Question 5)

Question 5

If your answers to Questions 1 and 4 are yes, please set forth the amount of damages, if any, that Mr. Willson should pay BankAtlantic Financial Corporation for:

a. Past Compensatory Damages:
$250,000.00

b. Future Compensatory Damages (reduced to present value):

$ ————————

SO SAY WE ALL this 18th day of December, 1996.

/s/ Illegible
Foreperson

APPENDIX E

[Filed Dec. 18, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,
Defendants.

SPECIAL VERDICT FORM AS TO PLAINTIFF ALAN LEVAN

We, the jury, unanimously make findings of fact as a special verdict pursuant to Rule 49(a) of the Federal Rules of Civil Procedure in the form of answers to the following questions:

Question 1

Has Mr. Levan proved by the greater weight of the evidence that the gist of the broadcast was false?

Yes ✔

No —

(If your answer to Question 1 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 1 is "Yes", proceed immediately to Question 2)

Question 2

If your answer to Question 1 is yes, has Mr. Levan proved by clear and convincing evidence that ABC published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 2 is "No", proceed immediately to Question 4, *do not* answer question 3. If your answer to Question 2 is "Yes", proceed immediately to Question 3)

Question 3

If your answers to Questions 1 and 2 are yes, please set forth the amount damages, if any, that ABC should pay Mr. Levan for:

a. Past Compensatory Damages:
$8,250,000.00

b. Future Compensatory Damages (reduced to present value).
$ ————

(After answering Question 3, proceed immediately to Question 4)

Question 4

If your answer to Question 1 is yes, has Mr. Levan proved by clear and convincing evidence that Mr. Willson

published the broadcast with knowledge of falsity or serious doubts as to its truth?

Yes ✔

No —

(If your answer to Question 4 is "No", the Foreperson should sign the form of verdict and you should not answer any more questions. If your answer to Question 4 is "Yes", proceed immediately to Question 5)

Question 5

If your answers to Questions 1 and 4 are yes, please set forth the amount of damages, if any, that Mr. Willson should pay Mr. Levan for:

a. Past Compensatory Damages:
$500,000.00

b. Future Compensatory Damages (reduced to present value):

$ _____

SO SAY WE ALL this 18th day of December, 1996.

/s/ Illegible
Foreperson

APPENDIX F

[Filed Dec. 18, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an indivdual,
and BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,
Defendants.

INSTRUCTIONS TO THE JURY

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished you will go to the jury room and begin your discussions—what we call your deliberations.

These instructions will be in three parts. First, I will instruct you as to the general rules that define and control your duties. Second, I will instruct you as to the rules of law you must apply. In other words, I will explain to you what, Plaintiffs, BFC and Mr. Levan, must prove and by what standard before you can return a verdict for

them. And third, I will instruct you as to some rules for your deliberations.

It is your duty to find the facts from all the evidence in the case. To those facts you must apply the law as I now give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on the evidence before you, and according to the law as I will explain it to you. You will recall that you took an oath promising to do so at the beginning of the case. Now it is your opportunity and obligation to do so.

In following my instructions, you must follow *all* of them, and not single out some and ignore others. They are all equally important. And you must not read into these instructions—or anything I may have said or done —any suggestion about what verdict you should return. That is a matter entirely for you to decide.

This is a action commenced by a corporation, BFC, and an individual, Mr. Levan, against a corporation, ABC, and an individual, Mr. Wilson. The fact that some of the parties in this case are corporations, is by itself, of no relevance to your considerations of this case. This case must be considered and decided by you as being among persons of equal standing in the community. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through people as its employees; and, in general, a corporation is responsible under the law for any of the acts and statements of its employees which are made within the scope of their duties as employees of the company. A corporation is also responsible under the law for

information acquired by its employees within the scope of their duties as employees of the company.

In your deliberations you should consider only the evidence—that is, the testimony of the witnesses and the exhibits I have admitted in the record—but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantal evidence" is proof of a chain of facts and circumstances tending to prove, or disprove, an ultimate conclusion.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls.

Now, in saying that you must *consider* all of the evidence, I do not mean that you must *accept* all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified

about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from the testimony of other witnesses?

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

If a party fails to call a person who possesses knowledge about the facts in issue, and who is reasonably available to it or him, and who is not equally available to the other party, then you may infer that the testimony of that witness is unfavorable to the party who could have called him and did not.

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties in the case. The testimony of the witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath. Such testimony is entitled to the same consideration, and is to be

judged as to credibility, and weighted, and otherwise considered by the jury, in the same way as if the witness had been present, and had testified from the witness stand.

Moreover, during the course of the trial, the parties have introduced statements by third parties and such who have not been present in this Court. As you know, I have allowed some of that evidence to be admitted with a limiting instruction. I just want to remind you that that evidence was allowed to be introduced not to prove the matter being stated by those out of court individuals, but for the fact that the statement was made. Thus, you are not allowed to consider those statements, as I have reminded you before when the limiting instruction was given, for the truth of the matter being said.

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field—one who is called an expert witness—is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Statements and arguments of counsel are not evidence in this case, unless made as an admission or stipulation of fact. When attorneys on both sides stipulate or agree as to the existence of a fact, however, you must, unless otherwise instructed, accept the stipulation as evidence and regard that fact as proved.

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records and other documents which are in evidence in the case. However, such charts or summaries are not in and

of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or sumamries are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts and figures shown by the evidence in the case, you are to disregard them entirely.

Any exhibits admitted in evidence during the trial will be available to you for reviewing during your deliberations. If an exhibit is received in evidence but is not fully read or shown to you at the time, do not be concerned because you will get to see and study it during your deliberations.

In this case it is the responsibility of the plaintiffs to prove, by certain standards of proof depending on the allegation made, every essential part of its or his respective claims. This is sometimes called the "burden of proof" or the "burden of persuasion." The defendants do not have to prove anything. For certain elements of plaintiffs' case, they must prove their assertions by the standard of proof entitled "Greater weight of the evidence," which is also known as a preponderance of the evidence. For other elements of the plaintiffs' case, they must prove their assertions by the standard of proof known as clear and convincing evidence. Later, I will inform you as to when each standard should be used, but for now, I will now define these different standards for you.

First, a "Greater weight of the evidence" or a "preponderance of the evidence" simply means an amount of evidence which is enough to persuade you that the Plaintiff's claim is more likely true than not true.

The standard of "clear and convincing evidence" differs from the standard of preponderance of the evidence in that clear and convincing evidence is more compelling and persuasive. Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion and of such weight that it produces in you, the jury, a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

The word knew or "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistakes or accident.

In deciding whether any fact has been proved by either of the appropriate standards you may consider the testimony of all of the witnesses, regardless of who may have called them, and all of the exhibits received in evidence, regardless of who may have produced them.

If the proof fails to establish any essential part of the Plaintiff's claim by the appropriate standard you should find for the Defendants as to that claim.

Now that you have heard all of the evidence and the arguments of counsel, it becomes my duty to give you the instructions of the court concerning the law applicable to this case.

In your deliberations, you are to consider the following cause of action for defamation. Originally, you were also to consider a cause of action by Plaintiff for False Light Invasion of Privacy. However, the false light claim is no longer at issue before you, and thus, you are only to consider Plaintiffs' cause of action for defamation. Plaintiffs, Alan B. Levan and BankAtlantic Financial Corporation (BFC), allege that Defendants, American Broadcast Companies, Inc., and William H. Willson, a producer of

the "20/20" news magazine, broadcast an investigative news report, on November 29, 1991 that contained false and defamatory statements and images about the plaintiffs. Defendants, Mr. Willson and ABC, deny Plaintiffs' allegations.

You will better understand the rules of law about which I am informing you if you keep in mind that this case involves two sets of values, both of which are important in our society. Under certain conditions, the law of Florida grants plaintiffs the right to recover damages for false, defamatory statements that injure their reputations.

On the other hand, the United States Constitution and the Florida Constitution guarantee freedom of speech to individuals and to the press. These constitutional guarantees entitle the press, which includes broadcasters, to publish critical statements about people, particularly people in public positions, and protects the press from liability for such statements, except if, under the standards I am about to describe, the statements are of such a nature and are made under such circumstances as to deprive the persons who make them of protection.

In this case, I have already determined that Mr. Levan and BFC are both public figures. The term "public figure" is a special term used by the law to describe persons who, by their own actions, have invited attention to and comment about themselves. The law affords the press protection in these circumstances, in order to avoid inhibiting comment and debate about people or companies in the public eye.

To recover for a false statement, public figures such as Plaintiffs, BFC and Mr. Levan, here must first, establish by a greater weight of the evidence that the gist of Defendants' broadcast was false. Then, Plaintiffs must prove by clear and convincing evidence that ABC and Mr. Willson

broadcasted the report knowing that it was false or having actual, serious doubts about its truth.

Although the plaintiffs' claims have been tried together, each is separate from the other. Therefore, in your deliberations, you should consider the evidence as it relates to each claim separately, as you would had each claim been tried before you separately.

There are elements that each of the two plaintiffs must prove in order to prevail in this libel/defamation action. You may return a verdict for each of them only if you make all of the following findings:

—That the gist of the news report was false;

—That one or both of the defendants published a false news report about Mr. Levan and BFC knowing that it was false or having serious doubts about its truth; and

—That Mr. Levan and/or BFC was injured as a direct result of the broadcast of this news report.

I shall now define for you in more detail each of these elements.

The first question before you that you must decide is what was the gist—the core, the substance, the essential message—of the broadcast. The gist is really a summary of the heart of what the broadcast was about. In deciding what the gist of the broadcast was, you should consider the broadcast in its totality and assess it through the eyes of the average viewer. You should give the broadcast the meaning that the average viewer would give it.

In determining the gist of the broadcast, you are to consider statements of fact in the context of the entirety of the 20/20 broadcast, including, but not limited to, the

headlines and introductions, the verbal and written statements, the pictorial and video images, and such surrounding the broadcast.

Once you have determined the gist of the broadcast, then you may determine, whether or not the gist of the broadcast is false. In making this determination, if you find proof that the broadcast may have contained minor misstatements or inaccuracies, that is insufficient to prove falsity if the gist or substance of the broadcast, taken as a whole, is substantially true.

Moreover, in reaching your determination about whether the gist of the broadcast was true or false, you may not consider statements in the broadcast that you find to be pure opinion. Statements of pure opinion are those statements that are not capable of being proved true or false. Statements of fact and statements of opinion that imply false facts are, on the other hand, actionable. Therefore, you may consider them when you are determining whether the gist of the broadcast was true or false.

An actionable mixed expression of opinion occurs when an opinion or comment is made which is based upon facts regarding the Plaintiffs or their conduct that have not been stated in the broadcast or assumed to exist by the parties to the communication. However, this rule does not relieve the defendants from being subject to suit if the disclosed facts upon which an opinion is based are false, even though there is no suggestion or implication that the person is relying on undisclosed facts.

It is my duty as the judge in this case to decide which statements in the broadcast were statements of opinion and therefore removed from your consideration. I have found the following statements to be statements of opinion which, again, you may not consider in deciding whether the gist of the broadcast was false:

—"Roll-ups are kind of like kicking a guy when he's down" is a statement of opinion.

—The words spoken by Roy Henry in the broadcast that "He [referring to Mr. Levan] represents the worst roll up that I've ever seen." is an opinion.

—These words by John Stossel are also words of opinion: "It's something to think about the next time someone says "give me your money, we'll be partners.' "

Thus, concerning the gist of the broadcast, the issue for your determination on the defamation claim of Mr. Levan and BFC against defendants is:

Whether the gist of the broadcast concerning Mr. Levan and BFC was in some significant respect false statements of fact.

If the greater weight of the evidence does not support the claim of Mr. Levan or BFC that the gist of the broadcast was false then your verdict should be for ABC and Mr. Willson. "Greater weight of the evidence" means the more persuasive force and effect of the entire evidence in the case. However, if the greater weight of the evidence does support the claim of Mr. Levan or BFC on that issue, then you must determine defendants' state of mind when airing the broadcast.

You must next determine whether clear and convincing evidence shows that at the time the broadcast was aired, ABC or Mr. Willson knew the gist of the broadcast was false or had serious doubts as to its truth. The word knew or "knowingly," means that the act was done voluntarily and intentionally and not because of mistake or accident.

Again, "Clear and convincing evidence" differs from the "greater weight of the evidence" in that it is more

compelling and persuasive. "Clear and convincing evidence" is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue.

If Plaintiffs do not prove by clear and convincing evidence that ABC and Mr. Willson knew at the time of the broadcast that the gist of the broadcast was false, or that they had serious doubts then as to its truth, your verdict should be for ABC and Mr. Willson.

However, if clear and convincing evidence does support Mr. Levan and BFC's claim on this issue, and the greater weight of the evidence supports Mr. Levan and BFC's claim on the other issues on which I have instructed you, then your verdict should be for Mr. Levan and BFC.

In deciding whether or not defendants knew at the time of the broadcast that the gist of the broadcast was false or had serious doubts as to its truth, you must determine both ABC and Mr. Willson's state of mind as to knowledge of falsity. The standard for determining Defendants', Mr. Willson and ABC, state of mind is a subjective one. Thus, the standard is *not* whether a reasonably prudent person would or should have had serious doubts about the truth of the broadcast or would or should have had a high degree of awareness that the gist of the broadcast was probably false. Rather, the question before you is whether one or both of these defendants *in fact* had such a state of mind.

Furthermore, keep in mind that the state of mind about which I am speaking refers to the state of mind of Mr. Willson and of ABC employees responsible for the content of the broadcast. What others may have thought, or what the average reasonable journalist may have thought,

or what *you* might have thought, is not the test. For you to render a verdict in favor of Mr. Levan or BFC or both of them, you must find that the evidence shows clearly and convincingly that Mr. Willson and/or other ABC employees with responsibility for what the report stated, broadcast the report knowing its gist was false or with serious doubts as to whether or not it was true.

Furthermore, Plaintiffs are entitled to prove Mr. Willson's and ABC's state of mind through circumstantial evidence, as I have defined before. Thus, in deliberating upon whether Mr. Levan and BFC have satisfied their burdens of proving knowledge of falsity or serious doubts as to truth on the part of the defendants with regard to the broadcast, you may consider all the evidence concerning the acts and conduct of ABC and its staff members that relate to the broadcast, including the acts of Mr. Willson.

Also, a principle to keep in mind in deciding the issue of whether defendants knew the statements were false or had serious doubts about as to its truth, is that your decision must turn upon the state of mind of ABC and its employees at the time of the broadcast.

On the issue of whether the broadcast was published with knowing falsity or serious doubts about its truth, you must examine the state of mind of each defendant concerning each plaintiff and you must answer the question separately for each defendant.

How do you answer that question for ABC, which is a corporation and does not have a state of mind? To determine this for ABC, you look at the beliefs of the persons whom ABC charged with responsibility for the content of the broadcast. If you find that any of them broadcast the news report knowing that its gist was false

or having serious doubts about its truth, then you may find that ABC did also. If none of them did so, then ABC did not do so, even though other ABC employees might have believed that the broadcast was false. You are not permitted to aggregate or add up the knowledge of all ABC employees in considering what ABC knew. ABC is answerable for the state of mind of only those persons to whom ABC gave responsibility for the content of the broadcast.

You must answer the question as to the state of mind of Mr. Willson separately. In order to find him liable, you must find that he personally proceeded with the broadcast despite knowing that its gist was false or despite having serious doubts about its truth.

You may find ABC liable by reason of the state of mind of Mr. Willson, because he is one of the employees of ABC who was responsible for the content of the broadcast. However, you may not find Mr. Willson liable only by reason of the state of mind of ABC. That is, if you find that ABC acted with knowing falsity or serious doubts as to truth solely because of the state of mind of a person or persons responsible for the content of the broadcast *other than* Mr. Willson, you may not find Mr. Willson liable on that ground alone.

If you find for ABC and Mr. Willson, you will not consider the matter of damages. But, if you find for Mr. Levan and/or BFC you should award an amount of money that the greater weight of the evidence shows will fairly and adequately compensate Mr. Levan and/or BFC for such loss, injury or damage as the greater weight of the evidence shows was caused by the broadcast complained of. A broadcast is a cause of loss, injury or damage if it directly and in natural and continuous se-

quence produces or contributes substantially to producing such loss, injury or damage. If you find for Mr. Levan and/or BFC, you shall consider the following elements of damage:

Any injury to reputation of Mr. Levan or BFC and any shame, humiliation, mental anguish, and hurt feelings experienced in the past or to be experienced in the future by Mr. Levan. There is no exact standard for fixing the compensation to be awarded on account of such elements for damages. Any award should be fair and just in light of the evidence.

Additionally, you may award damages for any earnings lost in the past and any loss of ability to earn money in the future by BFC or Mr. Levan. For those future damages you choose to award, any amounts which you allow should be reduced to their present money value and only the present money value of such amounts should be included in your verdict. The present money value of future economic damages is the sum of the money needed now which, together with what the sum will earn in the future, will compensate Mr. Levan or BFC for these losses as they are actually experienced in future years. In making this determination, you should resort to your own common knowledge and arguments of counsel.

However, if you find for Mr. Levan and/or BFC, but find that no loss or damage has been proved, you may award nominal damages. Nominal damages are damages of an inconsequential amount, such as a dollar, awarded to vindicate a right where a wrong is established, but no damage is proved.

Of course, the fact that I have given you instructions concerning the issue of damages should not be interpreted in any way as an indication that I believe that Plaintiffs should, or shoud not, prevail in this case.

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently or merely to get the case over with.

Remember, that in a very real way you are judges—judges of the facts. Your only interest is to seek the truth from the evidence in the case.

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A form of verdict has been prepared for your convenience. You will receive two separate verdict packests, one for each Plaintiff, and you must complete them both. Although some questions may be somewhat duplicated in each packet, it is imperative that you complete each verdict form in its entirity.

[Explain Verdict]

You will take the verdict forms to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict forms, date and sign it, and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

You will be furnished a copy of these instructions for your use during your deliberations. You must consider these instructions as a whole and you are not to give undue weight to any one portion of these instructions.

As you were instructed previously, you have been permitted to take notes during the trial. Please remember, your notes should be used only as memory aids. You should not give your notes precedence over your independent recollection of evidence. Also, you should not be unduly influenced by the notes of other jurors.

I emphasize that notes are not entitled to any greater weight than the memory or impression of each juror as to what the testimony may have been.

If there are any among you who smokes, you will be permitted a ten-minute break each hour for that purpose. You are reminded that you are not to discuss the case until you return to the jury room and recommence your deliberations. The jurors who remain in the jury room may not discuss the case while the smokers are absent. If you wish to smoke, the marshal will escort you to the balcony, the designated smoking area, each hour on the hour.

APPENDIX G

[Filed July 11, 1996]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORPORATION,
a Florida corporation,
Plaintiffs,

v.

CAPITAL CITIES/ABC, INC., a New York Corporation,
and WILLIAM H. WILLSON, an individual,
Defendants.

ORDER ADOPTING REPORT AND RECOMMENDATION

THIS CAUSE is before the court on the Honorable Magistrate Judge William C. Turnoff's Report and Recommendation (R&R) (d.e. 319) on defendants' Motion for Summary Judgment (d.e. 68). In his R&R, the magistrate judge recommends that this Court deny defendants' motion. Defendants filed objections to the R&R, which objections have been fully briefed. On August 18, 1995, the court notified counsel that it would defer ruling on the R&R and underlying motion pending the resolution of appeals that may affect the outcome of the motion for summary judgment. On June 25, 1996, the Court of

Appeals for the Eleventh Circuit issued its opinion on these related appeals and this issue is now ripe for determination.

Upon carefully reviewing the entire record, the court is in agreement with the magistrate judge. Rather than reiterate what the magistrate judge has so fully and capably explained, the court will only address one point upon which defendants seems to rely heavily in formulating their objections. This point is the Supreme Court decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386 (1994). Defendants rely on this case throughout their objections in support of their position that this Court should give preclusive effect to the vacated judgment. This reliance, as the magistrate judge has already explained, is misplaced. The *Bancorp* decision speaks directly to the issue of "whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after appeal is filed or certiorari is granted." *Id.* at 388-89. In other words, the decision focuses solely on the propriety of vacatur after settlement and *not* the preclusive effect of the vacated judgment. In addressing this specific issue, the *Bancorp* Court held that "mootness by reason of settlement does not justify vacatur of a judgment under review." *Id.* at 393. However, this is not a hard and fast rule. Vacatur will be allowed in exceptional circumstanes and

> [o]f course even in the absence of, or before considering the existence of, extraordinary circumstances, a court of appeals presented with a request for vacatur of a district-court judgment may remand the case with instructions that the district court consider the request, which it may do pursuant to Federal Rule of Civil Procedure 60(b).

Id. However, both parties agree that this Court is in no position to review Judge Ryskamp's decision to vacate his judgment and, thus, the court cannot delve into the 'exceptional circumstances' analysis. Rather, the court must proceed under the assumption that the judgment was properly vacated.[1]

The only issue for this court is whether or not the vacated judgment has any binding or preclusive effect on these proceedings. The issue finds its answer in controlling Eleventh Circuit precedent. In this Circuit, a vacated judgment has no preclusive effect, *United States v. M.C.C. of Florida, Inc.*, 967 F.2d 1559, 1561-62 (11th Cir. 1992) (holding that vacatur "divest[s] the lower court's earlier judgment of its binding effect"), even if the vacatur is entered pursuant to a settlement. *Delta Air Lines Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983) (holding that a judgment that had been vacated due to settlement has no preclusive effect). The non-binding cases defendants rely on to suggest otherwise do not change this established premise. As such, the court reaffirms its decision to adopt the magistrate judge's analysis and recommendation on this issue.

As for that portion of the R&R covering the Different Effects Test, the court agrees with the magistrate judge's analysis of the abridged transcript without offering an opinion on the accuracy of this unilaterally abridged transcript. As such, no further discussion by the court is necessary on this issue.

Therefore, upon careful consideration of the record and being fully advised of its premises, it is

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[1] Even assuming that the court could review Judge Ryskamp's decision, there is persuasive case law suggesting that a retroactive application of the *Bancorp* decision is not warranted. *See U.S. Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592 (Fed. Cir. 1995) and *Zeneca Ltd. v. Novopharm Ltd.*, 919 F. Supp. 193 (D. Md. 1996).

ORDERED AND ADJUDGED that the R&R (d.e. 319) is hereby *ADOPTED IN FULL* and made an Order of this Court. Further, defendants' June 19, 1995 Request for Oral Argument is hereby *DENIED*. Accordingly, it is

ORDERED AND ADJUDGED that defendants' Motion for Summary Judgment (d.e. 68) is hereby *DENIED*.

DONE AND ORDERED in Miami, Florida, this 10th day of July, 1996.

/s/ C. Clyde Atkins
Senior United States District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 92-0325-CIV-ATKINS

ALAN B. LEVAN, an individual, and
BANKATLANTIC FINANCIAL CORP.,
a Florida Corporation,
Plaintiffs,

vs.

CAPITAL CITIES/ABC, INC., a New York Corporation
and WILLIAM H. WILLSON, an individual,
Defendants.

REPORT AND RECOMMENDATION

This Cause was referred to the undersigned United States Magistrate Judge by the Honorable C. Clyde Atkins, United States District Judge, for a Report and Recommendation in accordance with 28 U.S.C. § 636(b). Presently pending before the undersigned is Defendants' *Motion for Summary Judgment* (D.E. 68).

FACTUAL AND PROCEDURAL HISTORY

This defamation action was brought nearly three years ago by Plaintiffs BankAtlantic Financial Corporation ("BFC") and its President and Chief Executive Officer, Alan B. Levan. Plaintiffs' complaint alleges that a news report aired on the ABC News television program "20/20" was libelous and false. This broadcast reported on the controversy surrounding financial transactions

known as "roll-ups" and specifically featured certain roll-ups promoted and executed by Plaintiffs.

In Februray 1993, Defendants Capital Cities/ABC and William H. Willson moved for summary judgment. Defendants contended that dismissal was appropriate because Plaintiffs had failed to show that the overall gist of the broadcast was false, a threshold requirement in a defamation action.

On July 22, 1993, the undersigned issued a Report and Recommendation concerning the motion for summary judgment. (D.E. 203). The Report analyzed in detail the ABC broadcast at issue. That Report concluded that the "gist" of the broadcast was that the roll-up transactions promoted by Plaintiffs "were unfair to the limited partners, that Plaintiffs knew that they were unfair, and despite this knowledge, Plaintiffs counseled the limited partners otherwise." *Report and Recommendation* (D.E. 203) at 18. The undersigned found that the issue of whether the roll-ups were knowingly unfair had been previously determined in a prior action styled *Purcell v. Bank Atlantic Financial Corporation*, No. 89-1284-CIV-Ryskamp).[1] Based on this prior judgment, the undersigned recommended dismissing this action since the prior judgment conclusively established that the "gist" of the broadcast (that the roll-ups were knowingly unfair to the limited partners) was substantially true. Accordingly, the undersigned concluded that Plaintiffs were precluded from collaterally relitigating whether the roll-ups were unfair in this subsequent defamation action and thus recommended summary judgment.

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[1] In *Purcell*, Plaintiffs Alan Levan and BFC were found liable for securities fraud. The *Purcell* jury found that certain "roll-up" transactions which Levan and BFC had proposed to their limited partners were unfair and that Plaintiffs knew this when they recommended them. The *Purcell* case is discussed in detail in the July 22, 1993, Report and Recommendation (D.E. 203) at 16-18.

Subsequent to the issuance of that Report, several events have occurred that require the undersigned to reconsider its recommendation. First, in July 1993, Plaintiffs appealed the *Purcell* judgment to the Eleventh Circuit Court of Appeals. In February 1994, the Eleventh Circuit dismissed the *Purcell* appeal due to the lack of finality of judgment. Recognizing that this dismissal might have serious implications in this action, on March 21, 1994, District Judge C. Clyde Atkins issued an Omnibus Order in which he deferred ruling on the Report and Recommendation pending the outcome in *Purcell*. *Omnibus Order* (D.E. 264) at 2.

On April 1, 1994, Plaintiffs filed a status report advising the Court that the parties in *Purcell* had agreed to settle the case and had agreed in principal that the settlement would include a vacatur of the *Purcell* judgment. Consequently, on June 6, 1994, Judge Atkins entered an Order addressing the uncertainty surrounding the finality of the *Purcell* judgment. (D.E. 267). Noting that the judgment in *Purcell* "may no longer be final," Judge Atkins rejected that portion of the Report recommending summary judgment and referred the matter back to the undersigned for further consideration in light of the circumstances in *Purcell*. *Order on Report and Recommendation* (D.E. 267).

On September 12, 1994, the *Purcell* court entered a new Final Judgment which vacated its prior judgment and verdict. The new final judgment made the following findings:

> 1. As previously observed by this Court in the trial of this cause, the court entertained serious doubt as to the merit of the case brought by plaintiffs.
>
> . . . .

> 3. The court was also concerned that a jury might make a decision in this case not on legal principles but on their own judgment of whether they thought the proposal was fair, regardless of the merit of the claim. . . . In fact, as this court has observed on several occasions earlier, the evidence offered in support of the verdict did not persuade the court and, had the case been tried, non-jury, would have resulted in a judgment in favor of the defendants.
>
> 5. The court previously observed and continues to believe that an appeal of the judgment in this case is hardly frivolous. The court has serious reservations about the award and has serious reservations about the legal rulings upon which it is based. In denying directed verdict and motions to set aside the verdict, the court was hardly convinced that the result rested on a solid legal or factual base, but was persuaded to allow the verdict to stand believing that the issues were well formed for appellate review.

Based on these findings, the court ruled as follows:

> 4. Having balanced the competing values of finality versus the right to relitigate an unreviewed dispute in light of the circumstances of this action as set out more fully in the Settlement Agreement, the December 18, 1992 judgment, December 17, 1992 verdict, and all findings and conclusions embodied therein, are hereby set aside, vacated, dissolved, and nullified and shall have absolutely no force or effect, including, but not limited to, any res judicata, collateral estoppel, or other preclusive effect whatsoever, for use against defendants, its successors or assigns, by plaintiffs or any third parties.

Final Judgment Approving Settlement and Order of Dismissal, (D.E. 282) Exhibit C. This vacatur calls into

question the preclusive effect of the original *Purcell* judgment. Thus, the undersigned must reexamine whether there still exist grounds for granting summary judgment. Oral argument on this issue was heard on February 8, 1995.

ANALYSIS

To begin, the undersigned notes that despite the language in the *Purcell* final judgment order stating otherwise, the determination of whether the *Purcell* verdict and judgment preclude this action rests with this Court alone. Case law dictates that courts do not have the power to decide the preclusive effect of their judgments in future litigation. The preclusive impact of a prior judgment is solely the province of the court in which the preclusion is being urged. *Dean Witter Reynolds v. Byrd,* 470 U.S. 213, 223 (1985); *Pettibone Corp. v. Easley,* 935 F.2d 120, 123 (7th Cir. 1991). Thus, the first task for the undersigned is to determine whether the vacated *Purcell* judgment has any preclusive effect in the instant case.

As indicated *supra,* the undersigned had previously found that the *Purcell* judgment did preclude further action in the instant case. Shortly after making this recommendation, the *Purcell* judgment on which the finding was based was vacated. Thus, the vacatur of the *Purcell* judgment no longer provides the undersigned with a certain judgment in which to ground collateral estoppel. Nonetheless, Defendants contend that the *Purcell* verdict and judgment are sufficiently final to support the application of collateral estoppel. A careful review of Defendants' position shows that their argument is unavailing.

Defendants admit that as a general matter if a judgment is vacated, the judgment will not be given preclusive effect. *See United States v. M.C.C. of Florida, Inc.,* 967

F.2d 1559, 1561-62 (11th Cir. 1992) (holding that vacatur divests the lower court's earlier judgment of its binding effect); *No East-West Hwy. Comm., Inc. v. Chandler*, 767 F.2d 21, 24 (1st Cir. 1985) ("A vacated judgment has no preclusive force either as a matter of collateral or direct estoppel."); *Wolcott v. Ginsburg*, 697 F. Supp. 540, 543 (D.D.C. 1988) ("As a general matter a judgment which is vacated, for whatever reason, is deprived of its collateral effect, both as collateral estoppel and res judicata."). However, Defendants contend that the same result is not warranted in a situation where as here, a judgment has been vacated at the request of two private parties because they have settled after the entry of judgment.

Defendants cite several cases recognizing that judgments that are not final for all purposes may be sufficient for purposes of collateral estoppel so long as the issue in question was fully and fairly litigated and the decision that resulted was not tentative. *See e.g. John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers*, 913 F.2d 544 (8th Cir. 1990) *cert. denied*, 500 U.S. 905 (1991) (defendants were collaterally estopped from relitigating issues determined by jury's verdict on liability even though the damages phase of the prior litigation was not concluded); *Alexander v. Chicago Park District*, 773 F.2d 850, 854 (7th Cir. 1985) *cert. denied*, 475 U.S. 1095 (1986); *O'Reilly v. Malon*, 747 F.2d 820, 823 (1st Cir. 1984); *Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1190-92 (5th Cir. 1982) *vacated and remanded on other grounds*, 460 U.S. 1013 (1983), *initial opinion adhered to on remand*, 718 F.2d 725 (5th Cir.), *cert. denied*, 460 U.S. 1013 (1983); *Lummus Co. v. Commonwealth Oil Refining Co.*, 297 F.2d 80 (2d Cir. 1961) (holding that "finality" in the context of collateral estoppel may mean little more than

that the litigation of a particular issue has reached a stage that a court sees no good reason for permitting it to be relitigated). However, none of the cases Defendants cite address the situation here, where the court has vacated its prior judgment. Defendants fail to cite one case from this Circuit in which a vacated judgment has been given a preclusive effect.

Given the lack of case law on point, Defendants ask for equitable relief. Defendants contend that Plaintiffs' settlement of *Purcell* was little more than an attempt to buy off the estoppel effect of the *Purcell* judgment and verdict. Defendants argue that such manipulation of the judicial system warrants this court using its equitable powers to overlook the vacatur of the *Purcell* judgment. Indeed, several courts have expressed their concern with the possible injury done to the court's integrity in situations where deep-pocketed litigants offer lucrative settlement terms in return for a joint motion to vacate. *See e.g., Federal Deposit Insurance Corp. v. Mintz*, No. 92-6679-CIV-GONZALEZ (S.D. Fla. July 26, 1994); *In re United States*, 927 F.2d 626, 627 (D.C. Cir. 1991); *Clarendon Ltd. v. Nu-West Industries, Inc.*, 936 F.2d 127 (3d Cir. 1991); *In re Memorial Hospital of Iowa County, Inc.*, 862 F.2d 1299 (7th Cir. 1988); *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 722 (9th Cir. 1982). Defendants specifically point to the United States Supreme Court's recent decision in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, —— U.S. ——, 115 S.Ct. 386 (1994) as support for their contention.

In *U.S. Bancorp*, the Supreme Court addressed the question of whether appellate courts in the federal system should vacate civil judgments of subordinate courts in cases that are settled after an appeal is filed. The Court expressed its disfavor for such practices and held that

judgments should be vacated only in exceptional circumstances and that "mootness by reason of settlement does not justify vacatur of a judgment under review". *Id.* at 393. Writing for a unanimous court, Justice Scalia explained that vacatur is an equitable remedy and as such must take into account the public interest. Scalia elaborated that "[j]udicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur." *Id.* at 392 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, —— U.S. ——, 114 S.Ct. 425 (1993) (STEVENS, J., dissenting).

While the Supreme Court's decision in *U.S. Bancorp* concerned only whether appellate courts should vacate judgments, lower courts have applied the principles set forth in *U.S. Bancorp* to both deny and grant vacatur at the district level. *See Espirito Santo Bank of Florida v. Kyriakides*, Nos. 89-16506-BKC-AJC, 90-0415, 1995 WL 75911 (Bankr. S.D. Fla. Feb. 6, 1995) (finding that "while the matter before this Court did not involve a judgment under review by an appellate court which has become moot, the principles and policies discussed in *U.S. Bancorp* regarding the treatment of motions to vacate judgments were applicable there); *Alexander v. Perrill*, 872 F. Supp. 722 (D. Ariz. 1995) (applying the standards set forth in *U.S. Bancorp* to find that vacatur was appropriate and consistent with Supreme Court precedent). Defendants argue that this precedent combined with the "realities of the *Purcell* litigation" lead to the conclusion that the prior decision in *Purcell* should prevent this Court from relitigating the question of whether the roll-ups were knowingly unfair. However, no courts have stretched the reasoning in *U.S. Bancorp* to the

lengths to which Defendants now contend is appropriate. Defendants' contention that the undersigned may somehow look past the vacatur in *Purcell is* not supported by legal precedent nor does it take into account the practical result of such blind neglect.

The practical effect of Defendants' contention would have this Court make a preliminary finding that the *Purcell* court's decision to grant vacatur was unjustified, effectively overruling that court's decision. Neither the decision in *U.S. Bancorp,* nor other cited precedent, grants this Court such license. The factors enumerated by the Supreme Court in *U.S. Bancorp* were for the benefit of appellate (and by implication trial) courts to consider when determining whether *granting* vacatur in certain circumstances is proper. *U.S. Bancorp* does not begin to address what effect a judgment may have once vacated. Indeed, nothing in *U.S. Bancorp* or the other cases upon which Defendants rely gives a second district court the authority to determine that another trial court's decision to vacate was improvidently granted, thus allowing the second court to accept whichever judgment it believes to be the most equitable. Nor does the undersigned find that the facts of this case warrant such a leap in reasoning.

In the instant case, the presiding judge in *Purcell* considered the actions that occurred at trial and the surrounding circumstances and decided that vacatur of that action was proper. Although the trial judge in *Purcell* did not have the benefit of the reasoning of *Bancorp* to aid in his determination, it is not within the province of this Court to second-guess his decision to vacate. Thus, the undersigned must give the *Purcell* vacatur its full impact.

Although two other circuits have held that in limited circumstances a vacated judgement still may have a preclusive effect, *see Bates v. Union Oil Co.*, 944 F.2d 647, 649-50 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1761

(1992); *Chemetron Corp.*, 682 F.2d at 1190-92; *see also Aetna Casualty and Surety Co. v. Jepperson*, 440 F.2d 394, 199-400, 403-05 (D. Nev. 1977), the Eleventh Circuit has held that a vacated judgment, even if due to settlement, has no precedential effect. *Delta Air Lines Inc. v. McCoy Restaurants, Inc.*, 708 F.2d 582 (11th Cir. 1983). The undersigned does not find the facts in this case distinguishable from *Delta*.

Based on the foregoing, the undersigned finds that the vacated judgment in *Purcell* has no preclusive effect. Nothing determined in the *Purcell* action can prevent further litigation by the parties in this action. Although the Court must be ever vigilant in protecting itself from manipulation by deep-pocketed litigants who use their means to strategically avoid the effects of unfavorable rulings, the decision on whether to vacate a judgment ultimately rests with the presiding trial judge. Review of a trial court's decision to vacate falls solely within the jurisdictional province of the appellate court. Not even the broadest principles of equity allow a second trial court to assume appellate jurisdiction and "look past" a vacated judgment in order to choose a verdict that it believes to be more just.

Moreover, the record in *Purcell* indicates that the vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the court expressed its belief that the judgment had weak underpinnings. was likely to be overturned on appeal, and noted the possibility of jury bias. These findings were consistent with the court's commentary made throughout the trial.[2]

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2 Defendants put great emphasis on the fact that the final judgment was drafted by Levan and BFC's counsel. Defendants state that "the judgment was signed in haec verba at the *Purcell* settle-

Thus, the undersigned believes that vacatur was proper even under the reasoning set forth in *U.S. Bancorp*.

Based on the foregoing, the vacated judgment in Purcell is insufficient to preclude the litigation of any of the issues in the instant case. To hold otherwise would prevent a trial on the merits of this action based on a judgment in a separate action which neither the parties to the prior litigation, nor the trial judge, believes is valid. Accordingly, Defendants' motion for summary judgment based on collateral estoppel grounds should be denied.

Different Effects Test

The Court's inquiry does not end here, because Defendants assert a second basis for granting summary judgment that was not addressed in the previous Report and Recommendation. Defendants assert that under what has become known as the "different effects" test, Plaintiffs have failed to show libel.

The "different effects" test was explained in the seminal case of *McCormick v. Miami Herald Publishing Co.*, 139 So.2d 197 (Fla. 2d DCA 1962). In *McCormick* the court set fourth the general principles used to govern its analysis:

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ment hearing by the presiding judge who denied without comment or opinion ABC's motion to intervene to protest the vacatur, who didn't ask to hear ABC's objections to the consent judgment until after it was signed, who did not in any oral or written statement indicate that the interest of the public as a whole (let alone ABC) in the preservation of the original judgment had been taken into account." (D.E. 297). At best, Defendants imply that the presiding judge did not take into account several factors that case law suggests he should have before entering the vacatur. At its worst, Defendants argument implies that the presiding judge simply "rubber stamped" the consent judgment without proper consideration. While the undersigned acknowledges that the degree of scrutiny a consent judgment may receive often varies, the record here shows that the *Purcell* consent decree received careful scrutiny.

> It has been held that newspapers are not to be held to the exact facts or to the most minute details of the transactions they publish, that what the law requires is that the publication shall be substantially true, and that the mere inaccuracies, not affecting materially the purport of the article, are immaterial. . . A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced.

Id. at 200 (citations omitted). To apply the different effects test the *McCormick* court eliminated from the articles the parts alleged to be false. The court then analyzed the edited articles and concluded that "the articles would not have produced a different effect, as the common mind would naturally understand them, than that which they produced with the alleged false parts included." Accordingly, the court held the articles were not libelous and dismissed the action. Courts since *McCormick* have consistently applied the "different effects" test to determine if an alleged libel was actionable. *See Nelson v. Associated Press*, 667 F. Supp. 1468 (S.D. Fla. 1987); *Hammond v. Times Publishing Co.*, 162 So.2d 681 (Fla. 2d DCA 1964); *Hill v. Lakeland Ledger Publishing Corp.*, 231 So.2d 254 (Fla. 2d DCA 1970); *Bishop v. Wometco Enterprises, Inc.*, 235 So.2d 759 (Fla. 3d DCA 1970).

In the instant case, Plaintiffs' cause of action is sufficient to pass the "different effects" test. Plaintiffs' Complaint takes issue with several of the statements made in Defendants' broadcast. After deleting the challenged portions of the broadcast the viewer is left with a different impression than the original broadcast.

To summarize, the edited broadcast* begins by giving broad prefatory information explaining how in the 70's and 80's big financiers, such as Plaintiffs, marketed real estate investments to smaller investors through the use of limited partnerships. The broadcast tells viewers that the partnerships made money until a downturn in the real estate market reduced their value. The story states that as a result of the downturn, most small investors believed that they would have to sell their real estate at a loss, but were instead offered the alternative of roll-up transactions. The report then describes what happens in a typical roll-up transaction. At this point in the edited broadcast, Plaintiffs are barely mentioned.

The first substantial reference to Plaintiffs occurs in the following portion of the report when the Levan roll-up is used as an example of an investment gone sour. The report specifically points to the Levan transaction and explains that in that roll-up the limited partners were given bonds in exchange for real estate. The edited broadcast states that many investors were given bonds with a face value of less than they invested. The report continues by stating that some of that loss was expected and this loss wasn't Levan's fault, but that the problem with the bonds was that their real value depends on the health of Plaintiffs' savings and loan. The report then states that even though Plaintiffs' bank had made every interest payment thus far, the general belief that the bonds would not be paid off devalued the worth of the bonds to the point that they were considered "junk." Nothing in the broadcast to that point indicates that the transactions were inherently unfair or that Levan had any improper motives in issuing the bonds.

*** In their motion, Defendants' have set forth an "edited" broadcast script which deletes the "challenged" portions of the actual broadcast.**

The next part of the report quotes a financial planner who states that the roll-ups were done for the benefit of the general partners only and not for the benefit of the limited partners. The broadcast then explains that Levan could not force the limited partners to accept the roll-up, rather the transaction had to be approved by a majority vote of the limited partners. The broadcast then explains that the root of the problem with many roll-ups, including Plaintiffs', may well be that the prospectuses are no longer understandable to the average investor and that Congress is looking into that very problem.

The abridged broadcast then airs comments made by Alan Levan in which he states that the limited partners' vote in favor of the roll up was the right decision and that in 20 years he has never failed to meet a contract obligation.

The broadcast concludes with the statement that Alan Levan's roll-up is just one of many where the general partner seemingly has done better than the limited partners and how in general small investors get burned when they invest in something they do not understand.

After deleting the contested portions of the broadcast the viewer is left with the conclusion that in general roll-ups have not benefited the smaller investor and that Plaintiffs' roll-up was no exception. The abridged broadcast indicates that the reason for this is that generally these investors are overwhelmed by the length of prospectuses and the complexity of the transaction. In contrast to the original broadcast, the abridged version does not lead the average viewer to assume that plaintiffs knowingly tried to dupe the limited partners into accepting an unfair transaction. Thus, the gist of the original published version does not lead the common viewer to the same conclusion as does the abridged version. Accord-

ingly, Plaintiffs' Complaint passes the different effects test and summary judgment should not be granted.

Finally, the undersigned believes that the public interest dictates that the merits of this action be decided by a jury at trial. The First Amendment guarantees the press a right to engage in rasping and controversial discussions on all topics of public interest. However, it does not guarantee a defense against libel. So far, the public has only heard one side of the story, that is, the "20/20" broadcast. Certainly, public interest dictates that both the content of the broadcast and its production deserve scrutiny on the merits. In such cases summary judgment is not appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding where there is a reason to believe that the better course would be to proceed to a full trial, summary judgment should be denied).

RECOMMENDATION

Based on the foregoing it is the recommendation of the undersigned that Defendants' *Motion for Summary Judgment* (D.E. 68) be DENIED. Pursuant to 28 U.S.C. § 636(b)(1)(B) and (C), the parties may serve and file written objections with the Honorable C. Clyde Atkins, United States District Judge, within ten (10) days after being served with a copy of this Report and Recommendation. See *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

DONE AND ORDERED, in Chambers, at Miami, Florida, this 17 day of April, 1995.

/s/ William C. Turnoff
WILLIAM C. TURNOFF
Chief United States
Magistrate Judge

APPENDIX I

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Supreme Court, U.S.
FILED
JAN 2000
CLERK

No. 99-1085

IN THE

Supreme Court of the United States

ALAN LEVAN and BANKATLANTIC FINANCIAL CORPORATION,

Petitioners,

—v.—

CAPITAL CITIES/ABC, INC. and WILLIAM H. WILLSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals correctly applied this Court's precedents in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) and *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657 (1989) in conducting its independent examination of the record on the issue of actual malice?

LIST OF PARTIES BELOW

The parties to the appeal in the United States Court of Appeals for the Eleventh Circuit were as follows:

Alan B. Levan and BankAtlantic Financial Corporation were plaintiffs-appellees-cross-appellants.

American Broadcasting Companies, Inc. and William H. Willson were defendants-appellants-cross-appellees. In their petition for a writ of certiorari, petitioners incorrectly state that Capital Cities/ABC, Inc. was a party to the proceedings below. Petition ("Pet.") at ii. American Broadcasting Companies, Inc. was substituted as the corporate defendant at the outset of trial. R32-3.* It is that entity against which the district court's judgment was entered (*see* Petitioners' Appendix ("Pet. App.") at 27a-28a) and that entity that appealed to the Eleventh Circuit. R27-670.

RULE 29.6 STATEMENT

The Walt Disney Company, a publicly traded company, is the ultimate parent of American Broadcasting Companies, Inc. ("ABC"). ABC has no wholly-owned subsidiaries and issues no shares to the public.

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* References to "R_-_" are to the record below; the volume number is followed by the docket entry number and the page number where appropriate.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES BELOW	ii
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
Procedural History	1
Statement of Facts	5
ABC's Newsgathering Activities	7
The Broadcast	15
REASONS FOR DENYING THE WRIT	18
I. THE ELEVENTH CIRCUIT'S DECISION PRESENTS NO CONFLICT AMONG THE CIRCUITS	18
II. THE ELEVENTH CIRCUIT CORRECTLY APPLIED GOVERNING LAW IN CONDUCTING ITS INDEPENDENT REVIEW OF THE EVIDENCE ON THE ISSUE OF ACTUAL MALICE	25
CONCLUSION	30
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	PAGE
Bose Corp. v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984)	22-23
Gertz v. *Robert Welch, Inc.*, 418 U.S. 323 (1974)	21
Harte-Hanks Communications, Inc. v. *Connaughton*, 491 U.S. 657 (1989)	23, 26, 27, 28, 29
Kaelin v. *Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998)	19n
Lundell Manufacturing Co. v. *American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996)	19n
Masson v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991)	21-22
McCormick v. *Miami Herald Publishing Co.*, 139 So. 2d 197 (Fla. Dist. Ct. App. 1962)	21n
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964)	19, 20, 23, 27
Peter Scalamandre & Sons v. *Kaufman*, 113 F.3d 556 (5th Cir. 1997)	19n
Purcell v. *BankAtlantic Financial Corp.*, 89-1284-CIV (S.D. Fla.)	*passim*
Purcell v. *BankAtlantic Financial Corp.*, 86 F.3d 1508 (11th Cir.), *cert. denied*, 519 U.S. 867 (1996)	3
Schiavone Construction Co. v. *Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988)	19n

PAGE

Smith v. *Cuban American National Foundation*, 731 So. 2d 702 (Fla. Dist. Ct. App. 1999) 20n

Woodard v. *Sunbeam Television Corp.*, 616 So. 2d 501 (Fla. Dist. Ct. App. 1993) 21n

Constitutional Provisions

U.S. Const. amend. I .....*passim*

Statutes

Limited Partnership Rollup Reform Act, Pub. L. No. 103-202, Title III, 197 Stat. 2359 (1993) 9n

IN THE

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No. 99-1085

ALAN LEVAN and BANKATLANTIC FINANCIAL CORPORATION,

Petitioners,

—v.—

CAPITAL CITIES/ABC, INC. and WILLIAM H. WILLSON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on September 29, 1999 should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and no error was committed by the court below.

STATEMENT OF THE CASE

Procedural History

This action for defamation and invasion of privacy was commenced in February 1992 by Alan B. Levan ("Levan"),

the President, Chief Executive Officer and controlling shareholder of the holding company then known as BankAtlantic Financial Corporation ("BFC"), and BFC itself. R1-1. It concerns a segment of the ABC News television program "20/20" broadcast in November 1991 which reported on the public controversy concerning "rollups." The report was critical of rollups generally; it criticized the unfairness of the rollups effectuated by Levan and BFC specifically but was also clear to report that they were "all legal." R1-12, Ex.A.

Issue was joined in early 1992, R1-12, and discovery ensued. While discovery proceeded, three securities fraud actions, also pending in the Southern District of Florida and consolidated as *Purcell* v. *BankAtlantic Financial Corp.*, 89-1284-CIV (S.D. Fla.), proceeded to trial. These actions, each of which was filed before ABC's broadcast, had been commenced by and on behalf of investors who had been severely damaged by the Levan/BFC rollups, the very rollups reported on by ABC. R9-203-16. The investors claimed that the Levan/BFC rollups were fraudulent under federal securities law and state law. *Id.*

At the conclusion of a two-week trial, the *Purcell* jury determined that Levan and BFC had committed securities fraud. R15-320-Ex.B. Damages were awarded in the amount of $8 million. *Id.* In response to special interrogatories included as part of its verdict, the jury determined that the Levan/BFC rollups had been unfair to their limited partners and that Levan and BFC had knowingly misrepresented to them the fairness of the transaction. *Id.* The jury's verdict was widely reported both by BFC, in public filings, and by the press. R-27-688; *see* R26-637-65. Levan and BFC's motion for judgment as a matter of law was denied; judgment was entered for the plaintiff class and Levan and BFC appealed to the Court of Appeals. R15-320-Ex.B; *see* R13-276-Ex.B.

ABC then moved for summary judgment in this action urging that as a result of the judgment in *Purcell*, plaintiffs were collaterally estopped from contesting the substantial truth of ABC's broadcast reporting on the unfairness of the Levan/BFC rollups. The Magistrate Judge agreed and issued his recommendation that summary judgment be granted to ABC. Shortly thereafter, the two *Purcell* defendants offered to pay the plaintiff class the full amount of the verdict—dollar for dollar—plus interest, but only in exchange for an agreement to make a stipulated motion seeking vacatur of the jury verdict and the resulting judgment that Levan and BFC had committed fraud. The case settled on those terms. *Purcell* v. *BankAtlantic Financial Corp.*, 85 F.3d 1508, 1510 (11th Cir.), *cert. denied*, 519 U.S. 867 (1996).

On learning of the settlement, ABC moved to intervene in the *Purcell* action for the limited purpose of contesting the vacatur of the *Purcell* verdict and judgment for collateral estoppel purposes; the motion was denied. *Id.* at 1511.[1] Shortly thereafter, the *Purcell* verdict and judgment were vacated. R15-320-Ex.H.

On the basis of the stipulated vacatur, ABC's summary judgment motion was reconsidered and denied. R15-319; R16-362. The court also entered an order precluding any evidence of or concerning the *Purcell* verdict or any of the publicity surrounding it during the course of the then-upcoming trial in this action. R21-435.

In October of 1996 the trial began. At the close of plaintiffs' case in chief, defendants moved for judgment as a

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[1] ABC appealed from the denial of its motion to intervene; the denial was affirmed by the Eleventh Circuit, which ruled that ABC lacked standing to oppose the vacatur. *Purcell*, *supra*, 85 F.3d at 1513. This Court denied ABC's petition for a writ of certiorari to review that ruling. 519 U.S. 867 (1996).

matter of law dismissing the claims for false light invasion of privacy and punitive damages. R24-552. Finding that the false light privacy claim was wholly duplicative of Levan's libel claim and therefore barred under Florida law, the district judge dismissed the claim. R24-559. At the same time, the court dismissed plaintiffs' claims for punitive damages, finding that there was "no legally sufficient evidentiary basis for a reasonable jury to find that Defendants broadcast[ ] the 20/20 segment at issue with the 'primary purpose' of indulging in 'ill will, hostility and an intent to defame.' " R27-693-2.

At the close of the evidence, defendants moved for judgment as a matter of law on the remaining libel claim. R62-4436-37. The district court denied the motion, *id.*, and submitted the case to the jury. On December 18, 1996, the jury rendered its verdict for plaintiffs, awarding compensatory damages to Levan and his company in the total amount of $10 million. R26-610; R26-611. Defendants' post-trial motions for judgment as a matter of law or, in the alternative, for a new trial or remittitur were denied. R27-667-49; R27-668. Defendants timely appealed to the Eleventh Circuit. R27-670.

On September 29, 1999, the Court of Appeals issued its unanimous 31-page decision written by Judge Tjoflat. After carefully articulating the appropriate standards for conducting its independent review of the evidence on the issue of actual malice, the Eleventh Circuit proceeded to review the information known to ABC about the rollup transactions before the broadcast, most of which was undisputed. Concluding that plaintiffs had failed to carry their burden of proving actual malice by clear and convincing evidence, the Court of Appeals vacated the district court's judgment and directed that judgment be entered for defendants.

Given that ruling, the court did not reach ABC's other claims of error. *See* Opinion at 15a n.24.

Statement of Facts

During the early 1980s, Levan and I.R.E. Financial Corporation (the predecessor of BFC) became national leaders in the selling of commercial real estate partnerships to the public. D.Ex. 89 at 2.[2] According to Levan, these public partnerships "were designed to allow little investors to participate in real estate just like the big guys." P.Ex. 76 at 1. Sales literature sent to prospective investors repeatedly promised them that it was anticipated that the partnerships would acquire and hold commercial real properties for a period of between four and six or seven years. D.Exs. 87 at 4, 496 at 11, 498 at 11, 511 at 11; R36-551-52. After that time, the literature asserted, it was expected that the properties would be sold and the sale proceeds distributed among the partners. D.Ex. 87 at 3, 496 at 10, 498 at 11, 511 at 10.

The structure of each public partnership was basically the same: a wholly-owned subsidiary of I.R.E. served as the corporate managing general partner together with individual general partners who were employed by or affiliated with I.R.E. Levan, who was chairman and president of I.R.E., served as an individual general partner for each of the limited partnerships. D.Ex. 277 at 3, 16, 26; D.Ex. 497 at 3, 16, 39. As in all limited partnerships, the limited partners were to have (and had) no role in the management or operations of the partnerships. D.Ex. 89 at 7.

Toward the end of the 1980s, Levan acquired a controlling interest in a struggling Savings and Loan which he renamed BankAtlantic. D.Ex. 1013 at 2-3. He changed

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[2] References to D.Ex. and P.Ex. are, respectively, to defendants' and plaintiffs' exhibits admitted in evidence at the trial.

I.R.E.'s name to BFC and made BFC the holding company for the S & L. *Id.*

Notwithstanding that Levan well understood that his limited partners anticipated that the real estate their partnerships were buying would be "liquidated" after a few years and their capital returned plus profits, P.Ex. 1143; R36-556, in 1989 BFC proposed an unusual rollup transaction. P.Ex. 223. The 337-page offering prospectus proposed that the limited partners exchange their short-term interests in the real estate in which they had invested for long-term unsecured subordinated debentures of BFC. *Id.*

As described in BFC's prospectus, under the terms of the proffered deal, the properties, cash and other assets originally held by the partnerships (with an appraised value of over $46 million net of debt) were to be transferred to BFC. *Id.* at 51, 64-65. The limited partners were to be issued 20-year unsecured subordinated debentures in BFC that had a face value of $30 million, representing approximately 65 percent of the appraised value of the limited partners' equity in their holdings. *Id.* at 64-66. The limited partners were told that Alan Levan, BFC, and the managing general partners believed the exchange was "fair" to the limited partners. *Id.* at 47.[3] After a consent solicitation period, a majority of limited partners in each of the three partnerships voted to accept the transaction. R57-3656.

Within two years, no meaningful market had developed for the debentures, which by then had traded for as little as 14.3 percent of the "exchange value" of the limited partners' assets acquired by BFC in the rollup. P.Ex. 458 at 16-17. By then, the *Purcell* actions had been filed against

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[3] It was this representation that the jury in the *Purcell* case, *supra*, found to be false since the representation was made when BFC and Levan "knowingly believed otherwise." R15-320-Ex.B.

Levan and BFC by their limited partners who believed that they had been betrayed by Levan's corporate self-dealing.

ABC's Newsgathering Activities

In the summer of 1990, ABC News received a letter from a viewer complaining bitterly about the use of rollups. D.Ex. 84. Senior Producer Meredith White concluded that the issue merited investigation and assigned Bill Willson, a veteran and award-winning "20/20" producer, to conduct further inquiries. R43-1701; R57-3726-27. John Stossel, also an award-winning journalist, was assigned as on-air correspondent. R57-3747. In the course of their research, Mr. Willson, Mr. Stossel and their staff of journalists came to learn of the Levan/BFC rollups and the claims in the *Purcell* litigation that those rollups were fraudulently perpetrated on investors. R43-1718.

As the Court of Appeals would later note, in conducting their investigation, ABC's journalists turned to "a wide variety of sources." Opinion at 6a; *id.* at 12a. Literally thousands of documents were collected and read;[4] scores of sources were contacted and interviewed;[5] three hearings before Congress and one before the Securities and Exchange Commission were observed and recorded;[6] litigation files and depositions were obtained and reviewed;[7]

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[4] *See, e.g.*, R42-1463; R43-1711-14, 1725; R53-3008-24; R54-3079-88, 3106-14, 3121-25, 3130-33, 3229-30; R57-3766-74; R58-3896-97.

[5] *See, e.g.*, R43-1716-21, 1725, 1806-08; R53-2947-48, 2953-56; R54-3089-99, 3133-37.

[6] *See, e.g.*, R43-1726; R53-2957-61, 2975, 3010-11; R54-3085-88, 3134, 3168; D.Exs. 339A-F, 225, 238, 244, 245, 246, 249, 259, 356.

[7] *See, e.g.*, R43-1721; R54-3123-25, 3130-33; D.Exs. 263, 264, 266, 267, 268, 269.

expert after expert was consulted.[8] There could be no claim in this case—and there was none—that ABC published its news report without having made an extensive investigation of the facts.

In preparing the broadcast, ABC interviewed and read analyses of the Levan/BFC rollups from a wide array of disinterested experts and outside observers of the deal. What the journalists were told by these individuals, all of whom were unconnected with the transaction (as either general or limited partners), was that the rollups were not only controversial but fundamentally unfair. For example, ABC learned:

From Press Reports and Financial Publications:

* That rollups generally were the subject of intense and continued criticism in the local, financial and national press, that the topic of rollups was under consideration by three Congressional subcommittees and that reform legislation was being actively considered by Congress and by several states. *See*, *e.g.*, D.Exs. 1A, 1B, 11A, 11C, 11D, 13A-C, 15, 17, 18, 24, 25, 29, 32-35, 39, 162.

* That the BFC rollups specifically were the target of sustained criticism in the Miami press and other financial and general circulation publications across the country. *See*, *e.g.*, D.Exs. 101A, 137C, 144, 148, 172, 353A, 359D, 359E, 359I.

* That as of 1991, BankAtlantic (Levan's savings and loan and BFC's principal asset) had suffered massive losses for three straight years, that it was in default of federal capital requirements at the end of 1990 and was sorely in need of cash, that it was operating under a supervisory

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[8] *See*, *e.g.*, R43-1712-14; R53-2998-3005; R54-3079-84, 3133-34; R58-3854-55, 3857-59.

agreement with federal regulators, and that BFC itself was reporting enormous losses throughout the entire period of the proposed rollup. *See*, *e.g.*, D.Exs. 97, 100B, 101A, 144, 147L, 387.

* That the first of the Levan/BFC rollups, accomplished in 1989, had fared so badly for investors that their $30 million in debentures had a market value at the time of the broadcast of less than $6 million, that Levan and his companies had netted over $17 million from the sale of only some of the properties obtained from the limited partners in the 1989 rollup, that Levan had immediately "pumped" more than $7 million into BankAtlantic and that Levan and BFC had been sued for securities fraud over the transactions. *See*, *e.g.*, D.Exs. 144, 148, 172, 359E, 359I.

From Members of Congress:

* While the *Purcell* suit was pending, Congress began investigations of the rollup phenomenon, holding extensive hearings in both Houses. One hearing, by the House Energy and Commerce Committee's Subcommittee on Oversight and Investigations, focused exclusively on the Levan/BFC rollups. P.Ex. 103 ("Hearings").[9] At those Hearings, which were attended by producer Willson and his camera crew, not a single disinterested individual defended Levan's rollup. Chairman John Dingell observed that Mr. Levan had advised the Subcommittee that in 1988 and 1989 a Florida bank "could not get a loan anywhere," that Mr. Levan had found "innovative solutions" to deal with this problem, one of which was his "novel rollup scheme," that the rollup

[9] Legislation was later adopted by Congress designed to assure that transactions such as the BFC rollup, which did not permit dissenting limited partners to cash out if they did not wish to participate in a rollup, never occurred again. *See* Limited Partnership Rollup Reform Act, Pub. L. No. 103-202, Title III, 197 Stat. 2359 (1993), D.Ex. 1139.

resulted in "large underlying real estate holdings [being] siphoned off from the benefit of the investors" leaving the investors with debentures in [BFC] "whose only real asset was a troubled bank," that "the best real estate was then immediately sold off" and used as "a cash infusion to help the bank" and that it appeared that "the assets of the limited partners were used to prop up the bank." Mr. Dingell remarked that it was "possible that the entire scheme may have been perfectly legal, which makes it far worse from a standpoint of public policy." *Id.* at 1-4.

* Representative Rowland, second ranking majority member of the Subcommittee, observed that the debentures issued in the 1989 rollup were worth "significantly less than the real estate and other assets the limited partners gave up," that it "appear[ed] that the holding company needed money badly and the bank also needed capital," and that it also appeared that "Mr. Levan's holding company and the bank got the better end of this deal." *Id.* at 11-12. *And see id.* at 4 (critical remarks by ranking minority member Representative Bliley, quoted at p. 17, *infra*).

From Congressional Investigators:

* At the Hearings, Bruce Chafin, Special Assistant to the Subcommittee, testified that as of July 1991 the $30 million in debentures issued in connection with the 1989 rollup were worth $6 million at most and perhaps even as little as $3 million, that BFC netted approximately $17 million from the sale of nine of the 17 properties it obtained by virtue of the 1989 rollup alone in addition to $3 million in cash formerly held by the limited partnerships, and that as of July 1991 the actual value of the nine properties already disposed of by BFC was at least three times the market value of the debentures. *Id.* at 11-12.

* Thomas C. Montgomery, Minority Counsel to the Subcommittee testified that "[w]ithout its rollups [BFC] would not have had the capital it needed to finance the bank," that

> [i]n the conflict between Mr. Levan's fiduciary responsibilities as chairman and chief executive of [BankAtlantic S&L] and of the holding company [BFC] and managing and individual general partner of the real estate limited partnerships, the needs of the bank appear to have prevailed over his responsibility to the partnerships. . . . It appears the firewall between the competing interests failed and the investors got burned.

Id. at 7-9.

From Federal Regulators:

* Timothy Ryan, Director of the Office of Thrift Supervision, testified at the Hearings that "most of [BFC]'s revenues came from the rollup activities," that BankAtlantic was a "troubled" institution and that if the $7 million obtained by BFC from the sale of the properties in the 1989 rollup had not been downstreamed to the bank, "then [the thrift] would not be in compliance with its capital requirements." *Id.* at 118, 119, 121.

* James R. Doty, the General Counsel of the Securities and Exchange Commission, testified at the same Hearings that grounds existed for criticizing the BFC rollup including that the transactions presented substantial conflicts of interest, that the investors were not offered the opportunity to consider alternative transactions, that the debentures were unsecured, speculative and substantially below the appraised value of the property and that the debentures had traded at only a small fraction of their face value, in some cases as low as 14.3% of the exchange value. *Id.* at 86.

From Limited Partnership Experts:

* Spencer Jeffries, one of the leading experts on real estate limited partnerships, in a study of the BFC rollups published in January of 1991 and reviewed by Mr. Willson prior to the broadcast, wrote that the bonds being issued were undervalued in comparison to the value of the real estate being "exchanged," that the market would likely reduce the value of the BFC debentures "to sheer rubble," that "many analysts familiar with the BAFC exchange offer consider[ed] the rollup an obvious attempt on the part of BAFC to increase its cash position to enable it to infuse much needed capital into struggling BankAtlantic," and that after only a "short while" BFC debenture holders "will likely have an intense desire to dust off their souvenir rollup prospectus and have it tightly wound on a roll for a more practical and decidedly appropriate use." D.Ex. 1167; R43-1713; R59-4034-54, 4079.

* Robert Stanger, considered the other leading commentator in the country on limited partnerships and a trustee of a *general* partner association, who was interviewed precisely because ABC thought "he might defend the rollup because he does defend rollups," R58-3855, told ABC that Levan was using the assets of the limited partners "to support an institution in which he earns all the upside," that the BFC debentures were "not ranked by credit agencies," and that he wouldn't vote for the transaction if he "were a limited partner." D.Ex. 339T.

From Securities Analysts:

* John Lynch, senior evaluator of taxable securities at J.J. Kenny, told ABC that investors should "STAY AWAY" from the BFC bonds, that there was no market for them, that the BFC bonds weren't even rated and were "toilet paper" and "garbage." D.Exs. 986, 1161; R44-2018-20.

* Joe Bencivenga, Deputy Director of Equity and High-Yield Research at Salomon Brothers, told ABC that BankAtlantic "should have been under RTC management 6 months ago," that "the debentures won't pay interest much longer," that "their long term maturity was a device to increase the bank's equity position," and that it was very fair to refer to the debentures as "junk." D.Ex. 986; R44-2021-22.

* Ed Markel, vice-president of First Miami Securities, told ABC that the BFC bonds were "junk" and that he wouldn't recommend them to his customers. D.Ex. 986; R44-2022-23.

* Of the six industry sources consulted by Mr. Willson, including Mr. Jefferies, Mr. Lynch, Mr. Hynes and all three of the firms purportedly making a market in the BFC bonds, two said that it was fair to characterize the bonds as junk; four said that they weren't even good enough to be referred to as junk. D.Ex. 1161; R53-3000-05.

From the Bond Market Itself:

* Finally, as Mr. Stossel testified, ABC's journalists were acutely aware that the bond market itself had such a poor view of the debentures that there was little if any market for them at all, and that the bonds, if they could be sold, would likely command no more than 20 cents on the dollar. As Mr. Stossel remarked, the price of a bond is itself "information." "This was thousands of people who put their money where their mouth is saying that this is bad news, this is a bad deal." R58-3868.

All this information, mutually supportive and utterly consistent, was known to the ABC journalists before the broadcast. No objective observer, no independent expert, no government official, no federal regulator offered any defense of the Levan/BFC rollups to ABC. As Mr. Stossel,

the correspondent for the report and the principal author of its script, testified:

> Every expert we talked to used phrases like: This is a good thing to leave in the glove compartment of your car for roadside emergencies. Usually you get two opinions about a story like this. *In this story, everywhere we turned people said that this was a bad deal.*

R58-3968 (emphasis added); *see id.* 3928-29. This critical testimony as to ABC's state of mind was totally uncontroverted by plaintiffs.

Arrayed against this mountain of critical information were two decidedly unobjective defenders of the Levan/BFC rollups: Alan Levan and his lawyer, Eugene Stearns. Although, as the Eleventh Circuit noted, Opinion at 23a n.36, Levan would later—and quite significantly—concede at trial that reasonable people could disagree as to the fairness of the transaction, R39-959-60,[10] in a lengthy meeting with producer Willson, Levan and Stearns denounced critics of the rollup and defended the transactions as "the best in the industry [and] extremely fair." R35-358. After months of negotiations and numerous efforts by Stearns to persuade ABC News executives to abandon their report, Levan declined to participate in an on-camera interview. P.Ex. 308A.2. Levan instead retained a public relations firm to assist him in preparing a videotape which he submitted to ABC defending the rollups. R39-964; P.Ex. 196. He also appeared before Chairman Dingell's Subcommittee but declined to have his testimony filmed by ABC's crew, invoking a House rule that permits witnesses to bar the audio or video recording of their testimony. R56-3548-49; P.Ex. 103 at 146-47.

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[10] Levan's paid expert, Steven Goldstein, and his counsel, during summation, both made the same concession. Opinion at 23a, n.36.

The Broadcast[11]

On November 29, 1991, ABC broadcast its report on rollups. Over video of the Miami skyline, anchor Barbara Walters opened the report as follows:

> In the 1980s, many people wanted to get rich quick in real estate, but what if you were a small investor who didn't really know how the game was played? Well, why not put your money in the hands of professionals? The smart money crowd knows how to parlay an investment into handsome returns. Tonight, John Stossel tells us of people who did just that, only things didn't quite work out as they planned.

P.Ex. 5 (Broadcast Transcript) at 6 (App. 3a).

The viewer was then introduced to Mr. Levan: "Miami, Florida has been good to a kid who started out with little and made it big here in real estate." *Id.* Pictures of Levan's estate and grounds were shown as Mr. Stossel described his success in the real estate and banking businesses. More broadly, the report went on to explain the growth of real estate limited partnerships in the 1980s generally and the nature of limited partnerships as an investment mechanism for smaller investors. It noted that more than 30,000 investors had invested more than $230 million to participate in partnerships sponsored by I.R.E. and explained to viewers that when "the boom burst" in the real estate market in the 1980s and "a change in the tax laws made things even worse," the value of the real estate held by partnerships such as Levan's diminished for reasons unconnected with Levan. What Levan did, the report said, was not "to sell the real estate and split the proceeds with the

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[11] Our description of the broadcast is necessarily truncated. For the convenience of the Court, the transcript of the broadcast has been reprinted in the Appendix ("App.") hereto.

investors" but to propose a rollup—and that, said Stossel, is "what this story is about." *Id.* at 7 (App. 5a).

After reporting about investor anger over rollups other than those proposed by Levan, *id.*, Mr. Stossel explained what a "rollup" is.

> *Stossel*: What is a rollup? It's simply an exchange of one investment for another. Instead of selling the real estate and giving limited partners their share, the general partner, supposedly acting in the interest of the limited partners, exchanges that investment for another, usually a stock that's traded on a stock exchange. There's nothing wrong with this if it's a fair exchange. The problem is that many rollups done so far have been bad deals for the limited partners.

Id.

Turning to the BFC-Levan transactions—"now let's look at Levan's rollup"—the broadcast explained how the limited partners' original investment in real estate had been transformed into a long-term interest in a bank holding company. "For many of the people [who invested]," Stossel said, "the amount printed on the bond was half of what they initially invested," with some investors being promised even less.

> *Stossel*: Of course some of that loss is expected. Much of Levan's real estate lost over half of its value. That wasn't Levan's fault and Levan's limited partners did get some cash payments in early years. But what's remarkable about Levan's rollups is that while he got cash for the properties, these bonds he gave them aren't worth the amount printed on them.

Id. at 7-8 (App. 5a-6a). In fact, as the broadcast went on to report, the debentures were then worth "only 20% of what's printed on the bond." *Id.* at 8 (App. 7a). Echoing the

testimony given, under oath, by the Subcommittee staff and others at the hearings devoted to the BFC-Levan rollups and information confirmed without exception by every one of more than a half-dozen experts in the valuation of bonds consulted by ABC, the broadcast continued:

> *Stossel*: You've heard of junk bonds? This is perceived as real junk.

Id.

Critical views of the rollup were then offered by Roy Henry, a financial planner who "helped sell Levan's deals" and was instrumental in instituting the *Purcell* litigation, and then by investors who voted against the rollups—all the time making clear that a majority of the investors had nonetheless voted to approve the exchange. *Id.* at 8 (App. 7a).

Efforts undertaken to persuade Levan's limited partners to approve the rollups were then reported followed by critical comments by Mr. Henry and Roz Lamb, one of Levan's limited partners. *Id.* at 8-9 (App. 8a-9a). Portions of Levan's videotaped statement submitted to ABC were then broadcast, including his claim that "[a] majority of the partners voted to accept more risk for the possibility of greater return." *Id.* at 9 (App. 10a). After noting that Levan had chosen to prohibit television coverage of his own testimony before Congress (invoking a House of Representatives Rule), the broadcast advised that Congress was then considering new rules for rollups and reported Representative Bliley's comments at the Hearings that:

> *Rep. Bliley*: There appears to be only one winner here—Alan Levan. It is clear that the limited partners, the real estate investors, have not benefited nor are they likely to.

Id. at 9-10 (App. 11a).

The report concluded with the following summary:

> *Stossel*: [voice-over] Levan's rollup is just one of many done recently where the general partner seems to have done better than his limited partners. The general partner does have the power. It's something to think about next time someone says, "Give me your money. We'll be partners."

Id. at 10 (App. 11a).

A month after the broadcast, Mr. Stearns sent ABC a letter complaining about various statements in the broadcast and making a formal demand for a retraction. P.Ex. 14. In response, ABC undertook a review of the broadcast and determined that it should be clarified in three respects. Opinion at 14a n.22. The clarification was aired on the "20/20" program of January 10, 1992. P.Ex. 722. Notwithstanding the broadcast of the clarification, this litigation was filed against ABC and its producer Bill Willson shortly thereafter. R1-1.

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH CIRCUIT'S DECISION PRESENTS NO CONFLICT AMONG THE CIRCUITS

In their attempt to manufacture a split among the Circuits, petitioners claim that the court below "held" that the "independent review" mandated by this Court in public figure libel cases extends beyond the issue of "actual malice" to include the issues of "gist" and "falsity" as well. Pet. at 17. According to petitioners, this supposed "holding" conflicts with decisions of "the Third, Fifth, Eighth and Ninth Circuits." *Id.* But the Eleventh Circuit made no such ruling.

On the subject of independent review, the court did offer the unexceptionable conclusion that:

> Our standard of review in libel cases in which the actual malice standard forms part of the jury charge is higher than in other cases. We are required to make an "independent examination of the entire record," *New York Times*, 376 U.S. at 285, 84 S.Ct. at 729, *to determine whether the evidence offered at trial supports a finding of actual malice.*

Opinion at 16a-17a (emphasis added). No ruling of any Court of Appeals differs with that much-repeated articulation of one of the central holdings of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964).[12]

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[12] In fact, it is difficult to understand how petitioners could seek to rely on the cited decisions of the Third, Eighth and Ninth Circuits for the proposition that they articulated a standard of independent review different from that articulated by the Eleventh Circuit when none of those cases involved an independent review of the issue of actual malice at all. In *Schiavone Construction Co.* v. *Time, Inc.*, 847 F.2d 1069, 1089-1093 (3d Cir. 1988), the issue was whether there was sufficient evidence of actual malice to preclude summary judgment for defendant; the doctrine of independent review is not even mentioned in the opinion. *Lundell Manufacturing Co.* v. *American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), did not involve a public figure plaintiff, and the court therefore was not called upon to, and did not, consider the standard of review for an actual malice determination. In *Kaelin* v. *Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998), the issue was, again, whether plaintiffs' claim could survive a motion for summary judgment; the doctrine of independent review was also not implicated or addressed. Petitioners' effort to establish that the Fifth Circuit is in "conflict" with the decision below is equally unpersuasive. The analysis conducted in *Peter Scalamandre & Sons* v. *Kaufman*, 113 F.3d 556 (5th Cir. 1997), was precisely the same as that conducted by the Eleventh Circuit here. The court examined the statements at issue to determine whether there was sufficient proof in the trial record that they were published with actual malice and held that there was not, reversing the jury's determination. *Id.* at 562, 564.

As for the Court of Appeals' determination as to the gist of the broadcast, the court—also unexceptionably—observed that the question was one of fact, but one which was necessarily "intertwined with Levan's allegations of actual malice, which we must subject to independent review." Opinion at 18a n.29. Again, the legal proposition that the determination as to actual malice is one subject to independent review stems from *New York Times Co.* v. *Sullivan* itself. To make that determination, the court must necessarily first address the gist of what was said.

As the Eleventh Circuit correctly recognized, Florida law, which applies in this diversity case, requires just such an examination of the "gist" or "sting" of a challenged publication.

> Under Florida law, a statement is not defamatory unless the "gist" or "sting" of the statement is defamatory. *See Smith* v. *Cuban Am. Nat'l Found.*, 731 So. 2d 702, 706 (Fla. 3d DCA 1999). The gist of any statement within a publication or broadcast is found only by reference to the entire context. See *Byrd* v. *Hustler Magazine Inc.*, 433 So.2d 593, 595 (Fla. 4th DCA 1983). If the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice. *See Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496, 517, 111 S.Ct. 2419, 2433, 115 L.Ed. 2d 447 (1991). Our first job, therefore, is to determine the gist or sting of the report.

Opinion at 18a (footnotes omitted).[13] Petitioners' suggestion that this doctrine—rooted in state law—is somehow

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[13] *See Smith* v. *Cuban American National Foundation*, 731 So. 2d 702, 705 (Fla. Dist. Ct. App. 1999) (per curiam) ("There is no way to determine the 'gist' or 'sting' of the publication in the mind of the average viewer without examining the statement in context . . . . Under the substantial truth doctrine, a statement does not have

inconsistent with or antagonistic to the actual malice inquiry is itself inaccurate for two distinct reasons. First, it rests in the first instance with Florida to determine the nature of its own libel law. No federal interests bar a state from making its libel jurisprudence more or less demanding—so long, that is, as it does not conflict with the First Amendment. *See, e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

Second, the pre-existing relationship between Florida libel law and First Amendment law has already been sanctioned by this Court. In *Masson* v. *New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), cited by the Eleventh Circuit, this Court said the following of California's identical test:

> As in other jurisdictions, California law permits the defense of substantial truth and would absolve a defendant even if she cannot "justify every word of the alleged defamatory matter; it is sufficient if the substance of the charge be proved true, irrespective of slight inaccuracy in details." 5 B. Witkin, *Summary of California Law* § 495 (9th ed. 1988) (citing cases). . . . Minor inaccuracies do not amount to falsity so long as "the substance, the gist, the sting, of the libelous charge be justified." *Heuer* v. *Kee*, 15 Cal.

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to be perfectly accurate if the 'gist' or 'sting' of the statement is true."); *McCormick* v. *Miami Herald Publishing Co.*, 139 So. 2d 197, 200 (Fla. Dist. Ct. App. 1962) ("A workable test is whether the libel as published would have a different effect on the mind of the reader from that which the pleaded truth would have produced." The court found that after eliminating the parts of an article alleged to be false, the article "would not have produced a different effect, as the common mind would naturally understand them"); *Woodard* v. *Sunbeam Television Corp.*, 616 So. 2d 501, 503 (Fla. Dist. Ct. App. 1993) (finding that "[t]he fact that [the driver] actually spent two years in prison, as opposed to the four years reported . . . , would not have a different effect on the mind of the viewer since this fact does not affect the gist of the story").

> App.2d 710,714, 59 P.2d 1063, 1064 (1936); *see also* *Alioto* v. *Cowles Communications, Inc.*, 623 F.2d 616, 619 (CA9 1980); *Maheu* v. *Hughes Tool Co.*, 569 F.2d 459, 465-466 (CA9 1978). Put another way, the statement is not considered false unless it "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." R. Sack, *Libel, Slander and Related Problems* 138 (1980); *see e.g.*, *Wehling* v. *Columbia Broadcasting System*, 721 F.2d 506, 509 (CA 5 1983); *see generally* R. Smolla, *Law of Defamation* § 5.08 (1991). Our definition of actual malice relies upon this historical understanding.

Id. at 516-17.

The Court of Appeals, in any event, correctly recognized that it had an obligation, imposed by the First Amendment, to conduct an independent examination of the record to determine if petitioners had presented clear and convincing evidence that defendants knew that the gist of the broadcast was false or had serious subjective doubts as to its truth. In order to undertake such an examination, the court was necessarily required to identify what the broadcast conveyed, a task hardly unfamiliar to courts.[14] Far from blurring the issues, as petitioners suggest, Pet. at 14, 20, the Court of Appeals well understood that although the issues of gist and actual malice were subject to separate analysis, where they are (as here) inextricably intertwined, the court cannot determine the latter without first addressing the former. This Court has consistently adopted the same approach. *See Bose* v. *Consumers Union of United*

[14] Both the majority and the dissent in *Bose* emphasized the long history—and the appropriateness—of judicial review of a jury's assessment of challenged speech in not only libel cases but other First Amendment contexts. *Bose*, *supra*, 466 U.S. at 506-07; *id.* at 517 n.1 (Rehnquist, J., dissenting).

States, Inc., 466 U.S. 485, 508 n.27 (1984) ("[R]eview of findings of fact is appropriate 'where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' "); *id.* at 506 n.24 (same); *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 285 n.26 (same).[15]

The Eleventh Circuit's approach is also entirely consistent with this Court's seminal decision in *New York Times Co.* v. *Sullivan* itself which established both the actual malice test and the doctrine of independent review. Describing the inquiry to be made, the Court held that a court must " '*examine for [itself] the statements in issue* and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . [was designed to] protect.' " *New York Times Co.* v. *Sullivan*, *supra*, 376 U.S. at 285. *Accord Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989) (same); *Bose*, *supra*, 466 U.S. at 510-11 (same).

Petitioners' answer to all of this is to exclaim repeatedly that the Court of Appeals was required to accept the jury's determination of the "gist." Not only is this contrary to

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[15] As the Court in *Bose* explained:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic . . . into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes—in terms of impact on future cases and future conduct—are too great to entrust them finally to the trier of fact.

Bose, *supra*, 466 U.S. at 501 n.17

the thrust of petitioners' argument before the Court of Appeals,[16] but it ignores the reality that the jury was never asked to and never did articulate any gist at all. What petitioners are really left to urge is that the jury must be presumed to have agreed with their counsel's *post hoc* articulation of the gist—despite the fact that he offered several at trial[17]—simply because the jury ruled in plaintiffs' favor. As such, the argument apparently goes, the case is closed. The argument is as circular as it is incorrect.

The consequence of petitioners' suggestion would be a complete abrogation of the doctrine of independent review itself. Reviewing courts would be left with a strange task indeed. They would be required first, to search the trial record to see how plaintiffs' counsel articulated the gist or, as in this case, to choose (although it is unclear how) among the many articulations offered by plaintiffs' counsel. A gist having been so chosen, the appellate court

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[16] As the Court of Appeals noted, "[t]he parties in this case agree that we must determine what the report, taken as a whole, is actually alleging about Levan, and then determine if ABC broadcast that meaning with actual malice." Opinion at 18a n.28.

[17] At one point during closing arguments plaintiffs' counsel insisted that the gist of the report was that Mr. Levan "knew [the transaction] was unfair. He knowingly misled his investors into the transaction, and then he hid from ABC News because he knew he couldn't stand the light of day." R62-4470-71. A short time later, plaintiffs' counsel urged that the "gist of the story" was that "Mr. Levan is hiding from us." R62-4494. Later still, plaintiffs' counsel maintained that the "story was *not* about the transaction; [it] was a character assassination on a good man." R62-4563 (emphasis added). And later still, counsel insisted: "The story was about Alan Levan. The story was about Alan Levan being someone who can't be trusted. The story was about Alan Levan being someone who couldn't sleep at night, someone who can't be trusted with money. And the story was about Alan Levan is a person who is hiding from us." R62-4565-66. Tellingly, petitioners do not urge this Court that the jury adopted any of these articulations of the "gist."

would then presumably search the record to see if there was clear and convincing evidence that defendants had serious doubts as to the truth of counsel's gist. Such a process would risk the most serious dilution of First Amendment rights in libel cases as plaintiffs' counsel routinely seek to conform what they believe is their strongest evidence of actual malice to what they choose to claim on appeal is the gist of what was said. Such a process is certainly not what this Court envisioned in articulating the constitutionally-mandated doctrine of independent review.

II.

THE ELEVENTH CIRCUIT CORRECTLY APPLIED GOVERNING LAW IN CONDUCTING ITS INDEPENDENT REVIEW OF THE EVIDENCE ON THE ISSUE OF ACTUAL MALICE

Petitioners claim that in conducting its independent review of the record on the issue of actual malice, as required by this Court's decisions, the Eleventh Circuit acknowledged that it was venturing into an "unsettled" area of law subject to "some confusion." Pet. at 14. What petitioners neglect to point out is that the Court of Appeals concluded that to the extent the law is unsettled as to how the doctrine of independent review relates to factual findings by the jury, it had no consequence *in this case* because the facts as to ABC's state of mind were overwhelming and undisputed. Opinion at 17a n.27, 20a.

In its opening discussion of the contours of independent review, the Court of Appeals correctly noted that "credibility determinations are reviewed under a clearly erroneous standard because of the jury's ' "opportunity to observe the demeanor of witnesses.' " " Opinion at 17a (quoting *Connaughton* and *Bose*). The court continued:

> Most courts show less deference when factfinding "rel[ies] on weighing of evidence and drawing of inferences." *Newton* v. *National Broad. Co.*, 930 F.2d 662, 671 (9th Cir. 1990); *see also Christ's Bride Ministries, Inc.* v. *Southeastern Pa. Transp. Auth.*, 148 F.3d 242, 247 (3d Cir. 1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 797, 142 L.Ed.2d 659 (1999). *But see Peter Scalamandre & Sons, Inc.* v. *Kaufman*, 113 F.3d 556, 560 (5th Cir. 1997) (holding no special review is accorded to "preliminary factual issues"). In any event, a *de novo* review of the entire record is not required; we must only satisfy ourselves that the evidence is sufficient for a finding of actual malice.

Id. Turning to this case, the court stated:

> We recognize, therefore, that the law is unsettled as to the deference that we give to "facts" found by the jury. In this case, however, most of the crucial evidence that relates to the actual malice element is undisputed: specifically, the overwhelming evidence that ABC had to support the broadcast's conclusion that the rollup was unfair to the limited partners.

Opinion at 17a n.27.

Petitioners also urge that the Eleventh Circuit erred in the method by which it conducted its independent examination of the facts relevant to the actual malice inquiry claiming that this Court's opinion in *Connaughton* required the Court of Appeals to identify facts that the jury "must have found" in order to evaluate actual malice. Pet. at 18. Petitioners' argument ignores the essence of *Connaughton*. *Connaughton* sets forth the appropriate method for determining what credibility determinations the jury must have made in resolving hotly disputed and conflicting testimony as was at issue there. There, after identifying three items of

disputed testimony the jury "must have found" in plaintiff's favor, the Court stated:

> When these findings are considered *alongside the undisputed evidence*, the conclusion that the newspaper acted with actual malice inexorably follows.

Connaughton, *supra*, 491 U.S. at 690-91. Here the undisputed evidence alone demonstrated that ABC did not entertain serious doubts as to the truth of the broadcast.

Petitioners' effort to apply *Connaughton* to the facts here illustrates the pointlessness of the effort. Petitioners' claim that had the Eleventh Circuit not "simply ignored *Connaughton's* guidance," it would have recognized that the jury must have found the following two facts:

> *First*, the jury must have found that the core message of the broadcast was that Mr. Levan and BFC knowingly misled their investors. *Second*, the jury must have found that, as Mr. Willson admitted, ABC knew that the gist (thus understood) was false. . .

Pet. at 26.[18] Yet this is simply no more than another way of saying that an appellate court has no serious role at all to play in determining whether actual malice has been proved by clear and convincing evidence. Put another way, petitioners' articulation of what the jury "must have found" is simply an end-run around the deeply rooted protections for free expression articulated in *New York Times Co.* v. *Sullivan* itself.

---

[18] Petitioners are incorrect in stating that Mr. Willson "admitted" that the gist of the broadcast was false; he did no such thing. In fact, he said quite the opposite. "[Y]es, [the broadcast] was critical of Mr. Levan's deal," Willson testified, "and I wouldn't have put it on the air if I didn't believe that there were reasons to be critical of the deal." R43-1854-55.

To be sure, *Connaughton* did indeed provide "guidance"—dispositive guidance, as it turned out—to the Court of Appeals. The court put it this way:

> In *Connaughton,* the newspaper used a single source as the basis for a highly improbable story that a candidate for judicial office had offered a bribe. *See id.* at 691-92, 109 S.Ct. at 2697-98. According to the source, the candidate had offered her and her sister a bribe (in the form of employment) during a conversation in his home at which five other people were present. Before it published the story, the newspaper spoke with the candidate, who had tape recorded the conversation, and the five other witnesses, all of whom squarely contradicted the source. The newspaper, however, neglected to listen to the tape recording, which the candidate made available. It also neglected to contact the source's sister, whom the source said would corroborate her version of the event. Under these facts, the Supreme Court held that the plaintiff had met his burden of establishing actual malice by clear and convincing evidence. *See id.* at 691-93, 109 S.Ct. at 2697-99.
>
> The instant case is precisely the opposite of *Connaughton*. ABC had numerous sources telling it that the rollups were grossly unfair for the limited partners. *See Perk v. Reader's Digest Ass'n*, 931 F.2d 408, 411-12 (6th Cir. 1991) (distinguishing *Connaughton* on the ground that the article at issue was supported by the "overwhelming number of sources"). Given these sources, ABC was not required to continue its investigation until it found *somebody* who would stand up for Levan. *See Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir.1992). The law only required that ABC not proceed to publication while entertain-

> ing "serious doubts" as to the truth of the broadcast. *St. Amant*, 390 U.S. at 731, 88 S.Ct. at 1325.

Opinion at 24a-25a.

Finally, petitioners launch an effort to identify what the jury "could have found"—the very standard rejected by the majority in *Connaughton*, 491 U.S. at 690,—and offer a laundry list of credibility determinations the jury "could have made." Pet. at 26-27. Although most of the proffered facts have little or no relevance to the issue of whether ABC knew that the gist of the broadcast was false, even if one were to assume that each of them was "found" by the jury, they cannot begin to outweigh the avalanche of information that ABC had learned from *all* disinterested observers of the transaction that the transaction was egregiously unfair, so much so, in the words of the Court of Appeals, that a viewer would believe Levan and BFC must have known that it was. *See* pp. 7-14, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

January 28, 2000

Respectfully submitted,

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TRANSCRIPT OF "20/20" PROGRAM –
November 29, 1991

Opening of Show

HUGH DOWNS, ABC News: Good evening, I'm Hugh Downs.

BARBARA WALTERS, ABC News: And I'm Barbara Walters and this is 20/20.

ANNOUNCER: From ABC News, around the world and into your home, the stories that touch your life. With Hugh Downs and Barbara Walters, this is 20/20. Tonight:

> WOMAN DEMONSTRATOR: Shame on you for going in there.

ANNOUNCER: Workers in panic across the South because this restaurant chain started firing homosexual waiters.

> ROGER AUGUSTINE, Lithonia, Georgia: I may have a little problem if I knew they had AIDS or something like that, but then, you don't know that. As long as he doesn't bleed in my food, what difference does that make, right?

ANNOUNCER: Loyal workers with proven records fired at will.

> SAM HARE, Dismissed Employee: What difference does it make what I do in the privacy of my own home? Whose business is it?

ANNOUNCER: Tom Jarriel reports: is firing homosexuals against the law? Can it really come down to "Whom Do You Sleep With?"

And a small investors' nightmare: they put up money for investing in real estate. Then it all went sour.

ROSALYN LAMB, Limited Partner: If things went down the tubes, he was supposed to sell the real estate and split the proceeds.

ANNOUNCER: Instead, they ended up with paper and promises. The man behind it wouldn't talk to us.

Mrs. LAMB: I don't know how he sleeps at night.

ANNOUNCER: It's all legal. What did he do and could it happen to you? John Stossel reveals the bottom line, it's "Too Good to Be True."

And if your marriage is in trouble, this story could save it.

JUDY MULLER: I feel like I'm not supposed to say anything, I'm not supposed to force the issue.

ANNOUNCER: When Judy and Bob felt their marriage had lost its meaning, they got help.

JO-ANN KRESTAN, Marriage & Family Therapist: Wait a minute, wait a minute. Let's get clear on whose—this is an issue that affects your life.

ANNOUNCER: What you argue about can hide the real problem.

BOB MULLER: Maybe that's at the core of the way I deal with a lot of things.

ANNOUNCER: What steps did she take? How did he change? A valuable lesson on rebuilding your marriage. Stone Phillips reports, "You Can Work It Out." Those stories tonight, November 29th, 1991.

* * * * *

"Too Good To Be True"

WALTERS: In the 1980's, many people wanted to get rich quick in real estate, but what if you were a small investor who didn't really know how the game was played? Well, why not put your money in the hands of professionals? The smart money crowd knows how to parlay an investment into handsome returns. Tonight, John Stossel tells us of people who did just that, only things didn't quite work out as they planned.

[voice-over] For them, the 80's are but a memory. So, too, it seems, is their money.

JOHN STOSSEL, ABC News: *[voice-over]* Miami, Florida has been good to a kid who started out with little and then made it big here in real estate. Alan Levan now lives in this elegant South Miami estate, protected by these electric gates and a high-powered security system. From his private pool and tennis court, he looks out on a beautiful lagoon and sculptured gardens. Levan made his money heading this real estate company in Coral Gables. Now, he's become a banker, too—he controls this big savings and loan in Fort Lauderdale—and he owes his success, according to this videotape he [s]ent us, to his desire to help the little guy.

> ALAN LEVAN Chairman, BankAtlantic Financial Corporation: These programs were designed to allow little investors to participate in real estate just like the big guys.

STOSSEL: *[voice-over]* The "programs" he's talking about are real estate partnerships. Throughout the 70's and 80's, we all kept hearing about all those big financiers getting rich on real estate. Many were getting rich—they got tax breaks and property values kept going up. Small investors wanted in on the action, but with $5,000 and $10,000 or $20,000 to invest, how could they participate? It costs millions to buy or build a shopping center.

[on camera] Levan and other promoters had a solution. "Give us your $5,000 or $10,000. We'll combine your investments into a pool of millions. We'll invest that in real estate and we'll all share the profits. Of course, you guys don't know anything about managing property and the risks involved, so we'll call you limited partners. You just sit there and send us your money. We, the general partners, we'll run things."

[voice-over] Levan's pitch was appealing enough that he was able to raise $230 million from 30,000 people, most of them small investors like retired salesman Hal Lamb and his wife Rosalyn.

ROSALYN LAMB, Limited Partner: We didn't go into it with the idea of making a killing. We went into it to get our—put our money in and get our fair share out.

STOSSEL: *[voice-over]* Levan's promotion tape said the general partner would make no profit unless the limited partners had at least doubled their money.

> ANNOUNCER: *[I.R.E. videotape]* Limited partners must receive[ ] 100 percent of their original investment, plus a 100 percent return on that investment—

STOSSEL: *[voice-over]* In the 70's and early 80's, real estate boomed. Levan's partnership made money. But then the boom burst. A change in the tax law made things even worse. Now, real estate held by partnerships was worth less and so investments held by people like the Lambs were worth less.

[on camera] Now, at this point, you could say, "I'm sorry, but too bad for them. They took a risk when they invested in real estate. They just have to sell their property at a loss." Fine. That's actually what the Lambs thought would happen.

Mrs. LAMB: If things went down the tubes, he was supposed to sell the real estate and split the proceeds with the investors. That's not what he did.

STOSSEL: *[voice-over]* What Levan did is something called a "roll-up" and that's what this story is about.

HAL LAMB, Limited Partner: Roll-ups are kind of like kicking a guy when he's down.

STOSSEL: *[voice-over]* In the rain in Orlando, Florida, limited partners, angry about other roll-ups, picketed a meeting of the General Partners Association. The limited partners say it's no surprise that they are out in the cold while the general partners, firmly in control, discuss their roll-ups in the posh hotel. Limited partners were not allowed in here.

HOTEL EMPLOYEE: Take it out. This is disruptive, sir.

STOSSEL: *[voice-over]* Neither were we.

[on camera] What is a roll-up? It's simply an exchange of one investment for another. Instead of selling the real estate and giving limited partners their share, the general partner, supposedly acting in the interest of the limited partner, exchanges that investment for another, usually a stock that's traded on a stock exchange. There's nothing wrong with this if it's a fair exchange. The problem is that many roll-ups done so far have been bad deals for the limited partners.

SANFORD ZEMEL, Limited Partner: I just feel that the limited partners have really gotten the short end of it in this whole deal.

STOSSEL: Now, let's look at Levan's roll-up. This is Barnett Square shopping center in Miami. Levan bought this property for the limited partnership for $5 million. Then, at the time of the roll-up, he said, "You know, real estate hasn't done as well as we'd hoped, but I won't stick you

with these properties. Instead, I'll trade them and give you bonds instead."

So he kept the property and recently sold it for $4 million—not great, but not bad. His company got that $4 million. What the limited partners got was this piece of paper.

[voice-over] The paper is a debenture, a bond. A bond is really just a promise—a promise, in this case, to pay back the money that's printed on the bond in 20 years and in the meantime, to pay more than 10 percent interest.

[interviewing] This is what they gave you?

RICHARD HINES, Limited Partner: Yes.

STOSSEL: It looks nice.

[voice-over] For many of the people, the amount printed on the bond was half what they had originally invested. Some lost even more.

Mr. HINES: This one's $350. I invested $2,500.

STOSSEL: Of course, some of that loss is expected. Much of Levan's real estate lost over half its value. That wasn't Levan's fault and Levan's limited partners did get some cash payments in early years. But what's remarkable about Levan's roll-up is that while he got cash for the properties, these bonds he gave them aren't worth the amount printed on them.

[voice-over] The bonds' value ultimately depends on the health of Levan's savings and loan. Its profits are supposed to assure that the limited partners will be getting fat interest payments.

Mr. LAMB: Sure we are. It says here 11.5 percent till March 31st, 1993 and 12.5 percent thereafter—

STOSSEL: Sounds good.

Mr. LAMB:—12.5 percent of what? It's just not there.

STOSSEL: *[voice-over]* That's the problem. Levan has made every interest payment so far, but his bank is losing money. Levan says it will prosper and that he's never defaulted on an obligation, but so few bond investors believe that Levan's company will pay off its bonds that today the limited partners' debenture are worth only 20 percent of what's printed on the bond.

[interviewing] You've heard of junk bonds? This is perceived as real junk. Levan gave his investors these and kept the real estate.

ROY HENRY, Financial Planner: He represents the worst roll-up that I've ever seen.

STOSSEL: *[voice-over]* Roy Henry runs a St. Louis-based financial planning company that helped sell Levan's deals. Now that the deals have gone sour, he and Levan are suing each other.

Mr. HENRY: There is no way that this transaction makes any sense. It is only done for the benefit of Alan Levan, for BankAtlantic. It is not done for the benefit of the limited partners.

STOSSEL: *[voice-over]* Still, Levan couldn't force investors to trade the real estate for his bonds.

[interviewing] How many of you voted yes? How many voted no? But it passed anyway.

[voice-over] Roll-ups must be approved by a majority vote of limited partners and although this group that invested through Roy Henry voted no, most investors said yes.

[interviewing] Why would they okay it?

Mr. HENRY: Because they cannot understand 360 pages of legalese.

STOSSEL: *[voice-over]* Levan sent investors this thick prospectus.

[interviewing] Did you read that?

Mr. LAMB: I could read it all right, but I couldn't understand the darn thing. I'd have to be an attorney or a lot smarter than I am.

> Rep. MATTHEW RINALDO, (R), New Jersey: Let me just show you. Here's one. Look at the size of that thing. Look at all those pages.
>
> RICHARD BREEDEN, Chairman, Securities & Exchange Commission: Well, that's just a summary.

STOSSEL: *[voice-over]* The purpose of a prospectus is to protect investors by telling them important risks, but over the years, regulators have kept increasing the number of things that must be disclosed, so much so that now many investors never read these things.

> Mr. BREEDEN: We're trying to do a better job and we will try and do a better job on that.

STOSSEL: *[voice-over]* Earlier this year, Congress held hearings on the problem.

Rep. RINALDO: We expect the common, ordinary investor to really be handed something like that and we're going to say we shouldn't do anything about it? I think we have to take action.

STOSSEL: *[voice-over]* After Levan sent out his thick prospectus, he started calling people. Well, he didn't call himself, he hired a company in this building—they wouldn't let us inside to take pictures—that employs dozens of people who make phone calls to investors.

Mrs. LAMB: We got phone calls. "Vote yes. This is the only way to go. If you don't vote yes, you'll lose all your money."

STOSSEL: *[voice-over]* When it was over, Levan had spent more than a million dollars of the investors' money to persuade them to vote for something that, so far, had reduced their investment by 80 percent.

Mr. HENRY: If any limited partner truly understood the transaction, they would have voted no.

Mrs. LAMB: I don't know how he sleeps at night, I really don't. I don't know how he can look at his face in the morning when he shaves, knowing that he has taken an unethical path and juiced us out of what was rightfully ours.

STOSSEL: *[voice-over]* Alan Levan himself, on the other hand is doing quite well. He put only a token amount of his own money into the partnerships and for running BankAtlantic along with the parent company that did the roll-up, Levan's been paying himself a salary of almost a million dollars a year.

LESTER TRANEL, Limited Partner: And it just burns you up when you hear this guy's still making a million dollars and we're losing the money.

STOSSEL: *[voice-over]* We wanted to ask Levan about all this.

[on camera] He said if we'd come here to Fort Lauderdale, to BankAtlantic headquarters, he would explain on-camera, why the roll-up was really a good deal for his investors, but right as we were about to leave, we got a letter from his lawyer, saying Levan had changed his mind and would not face the cameras.

[voice-over] He then hired his own camera and taped answers to questions he thought we'd ask.

Was the roll-up fair?

Mr. LEVAN: A majority of the partners voted to accept more risk for the possibility of greater return. I think they made the right decision.

STOSSEL: *[voice-over]* Isn't keeping the real estate for himself a conflict of interest?

Mr. LEVAN: There are definitely conflicts in these transactions. I'm the general partner in the partnerships, I'm Chairman and President of BankAtlantic Financial Corporation, which is a public company. I'm Chairman of BankAtlantic and each of these conflicts were fully and adequately disclosed in the prospectus.

STOSSEL: *[voice-over]* Will his investors be paid?

Mr. LEVAN: In the 20 years that we've been in business, we've never failed to meet a contract or an interest obligation.

STOSSEL: *[voice-over]* He also says now he's only paying himself half a million dollars. We thought we'd hear more complete answers on this day, when Levan, flanked by his lawyers, was summoned by a congressional committee to testify about his roll-ups. Surely the give-and-take of the congressmen would lead us closer to the truth.

Rep. THOMAS J. BLIKLEY, Jr., (R), Virginia: Mr. Levan, do you have an opening statement?

Mr. LEVAN: Yes. I do.

Rep. BLILEY: Very well. The Chair will recognize it. Go ahead, please.

Mr. LEVAN: Yes, sir. But Mr. Chairman, prior to that, I respectfully request that all cameras and recording devices be turned off.

STOSSEL: *[voice-over]* The congressman then told us we could not record Levan's testimony. Congress is now con-

sidering new rules for roll-ups, but they would come too late to help those who feel victimized by Levan.

> Rep. BLILEY: There appears to be only one winner here—Alan Levan. It is clear that the limited partners, the real estate investors, have not benefited nor are they likely to.

STOSSEL: You've seen lots of roll-ups. Have you seen any that made money for the investor?

Mr. HENRY: No. They have all been done in the best interests of the general partner.

STOSSEL: *[voice-over]* Levan's roll-up is just one of many done recently where the general partner seems to have done better than his limited partners. The general partner does have the power. It's something to think about next time someone says, "Give me your money. We'll be partners."

DOWNS: John, you wonder why this endlessly happens to people. Is the little guy ever able to make out in investments of this kind?

STOSSEL: Oh, yeah. I mean, certainly, some limited partnerships have made money for people, but why take the risk? 'Cause so many of them have gone bad. And as you say— I mean, I've reported on so many of these investment deals that went sour and it's always when its complicated and somebody invests in something they don't understand. That's when you get burned.

And the woman in the story said: "I wasn't out to make a killing," but she was trying to make more than she could make from a safe investment and that—

DOWNS: Like a certificate of deposit or something like that.

STOSSEL: Right. And when she invested, they were paying 10 percent. Instead, she lost 80 percent.

DOWNS: Thank you, John.

WALTERS: Well next, a question that millions of couples ask, "What's wrong with our marriage? What can we do about it?" Experts have identified one problem that's almost universal and that happened to this couple.

[voice-over] They got help from a counselor and our cameras were there. What you learn from them could save your relationship. Stone Phillips reports, "You Can Work It Out," right after this.

[Commercial break]

* * * * *

(3)

No. 99-1085

Supreme Court, U.S.
FILED
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IN THE
Supreme Court of the United States

ALAN B. LEVAN AND BANKATLANTIC FINANCIAL CORPORATION,
Petitioners,

v.

CAPITAL CITIES/ABC, INC. AND WILLIAM H. WILLSON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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REPLY BRIEF OF PETITIONERS

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13pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. THE BRIEF IN OPPOSITION DOES NOT MEANINGFULLY ADDRESS THE CIRCUIT SPLIT 2

II. THE ELEVENTH CIRCUIT IGNORED THE INQUIRY THIS COURT PRESCRIBED IN *CONNAUGHTON* 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	4
Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485 (1984)	6
Braun v. Soldier of Fortune Magazine, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993)	6
Brown v. Petrolite Corp., 965 F.2d 38 (5th Cir. 1992)	5, 8, 9
Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989)	2, 8, 9, 10
Kaelin v. Globe Communications Corp., 162 F.3d 1036 (9th Cir. 1998)	4
Lundell Mfg. Co. v. American Broad. Cos., 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997)	3, 4
Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991)	4
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)	4
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	6, 8
Peter Scalamandre & Sons, Inc. v. Kaufman, 113 F.3d 556 (5th Cir. 1997)	5, 8, 9
Schiavone Constr. Co. v. Time, Inc., 847 F.2d 1069 (3d Cir. 1988)	4
Smith v. Cuban American Nat'l Found., 731 So. 2d 702 (Fla. Dist. Ct. App. 1999)	3
CONSTITUTION	
U.S. Const. Amend. VII	6, 7

ABC's Brief in Opposition fails to engage the central points made in the Petition. On the first question, ABC does not (because it cannot) dispute that the Eleventh Circuit made its own, *de novo* determination of the broadcast's "gist," a preliminary factual issue that the parties vigorously contested at trial and that the jury resolved in petitioners' favor; that the court's determination of the gist was outcome-determinative; that petitioners' version of the gist was reasonable; and (as even the Eleventh Circuit recognized) that actual malice would have been established if the court had accepted petitioners' view of the gist. Nor does ABC deny that Mr. Stossel had intended the broadcast to convey this gist, and that the magistrate, the district court, and even ABC's own lawyers before trial had accepted this gist. And ABC devotes only one page and a single footnote of its 29-page brief to a discussion of the circuit split concerning the extent to which an appellate court may re-examine a jury's determination of gist and falsity. As if to highlight the almost unlimited breadth of the re-examination it believes appropriate, ABC devotes much of the balance of its brief to rehearsing its own version of preliminary facts—a version that the jury rejected when it returned its verdict in petitioners' favor.[1]

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[1] Moreover, ABC's recitation of the facts is misleading and irrelevant in many respects. For example, its lengthy recapitulation of the *Purcell* litigation is contrary to the findings of both the *Purcell* court and the *Levan* court. *See* Pet. App. 60a-61a, 67a. *Purcell* was decided a year *after* the broadcast, and therefore was irrelevant to ABC's state of mind and the issue of actual malice. Moreover, as the *Levan* magistrate noted: "[T]he record in *Purcell* indicates that vacatur was based on more than a wealthy litigant's buy out of an unfavorable judgment. Rather, the *Purcell* final judgment included specific findings in which the court expressed its belief that the judgment had weak underpinnings, was likely to be overturned on appeal, and noted the possibility of jury bias. These findings were consistent with the court's commentary throughout

As for the second question presented, ABC does not (because it cannot) suggest that the Eleventh Circuit made any attempt—as required by *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989)—to identify preliminary facts that the jury "must have found." ABC instead argues that there were no preliminary facts to identify, and that the Eleventh Circuit was therefore free to ignore *Connaughton*. In fact, after weighing the purported "mountain" of evidence that ABC believed the transactions to be unfair, the jury chose to believe instead the witnesses who testified that ABC *admitted* to them that its story was false. The Eleventh Circuit's failure to identify this evidence and to defer to the jury's findings is wholly inconsistent with *Connaughton*.

Finally, ABC does not (because it cannot) dispute the importance and the recurring nature of the questions presented, the need for guidance on these questions as noted by courts and commentators, or this Court's recognition of its unique responsibility to provide such guidance. For all these reasons, the Petition should be granted.

I. THE BRIEF IN OPPOSITION DOES NOT MEANINGFULLY ADDRESS THE CIRCUIT SPLIT.

A. Despite ABC's suggestion to the contrary (Br. in Opp. 20), petitioners do not deny that *someone* must determine the central meaning or "gist" of an allegedly libelous broadcast. The question (on which the circuits are split) is whether this determination is for the jury alone, or whether appellate courts may re-examine it *de*

---

the trial." *Id.* at 67a. At the same time, the Brief in Opposition for the most part ignores the evidence that caused the jury to conclude that the transactions were fair, that Mr. Levan believed them to be fair, and that ABC's own witnesses reached the same conclusion. *See* Pet. 8-11.

novo.[2] Most courts of appeals to consider the question have concluded that, where reasonable persons could disagree as to a publication's gist, the determination is one of fact and is therefore for the jury alone. *See* Pet. 19-24. The Eleventh Circuit disagreed, concluding instead that a reviewing court may redetermine the gist *de novo*. Although ABC attempts to show that no conflict exists by distinguishing the opinions of the other courts of appeals in a single footnote, its argument is unavailing.[3]

First, although ABC argued to the district court that *Lundell Manufacturing Co. v. American Broadcasting Cos.*, 98 F.3d 351 (8th Cir. 1996), *cert. denied*, 520 U.S. 1186 (1997), "run[s] directly counter to" Eleventh Circuit precedent, 34 R626-14 n.11, it now argues that *Lundell* is inapposite because the *Lundell* court did not "consider the standard of review for an actual malice determination." Br. in Opp. 19 n.12. But both the Eighth Circuit in *Lundell* and the Eleventh Circuit in this case did consider the standard of review *for a determination of the preliminary questions of gist and falsity*. ABC does not dispute that it asked both courts to apply independent review to *those* questions. And,

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[2] ABC relies (Br. in Opp. 20 n.13) on *Smith v. Cuban American National Foundation*, 731 So. 2d 702 (Fla. Dist. Ct. App. 1999) (per curiam), but the court there held that, "[i]f [as here] the statement is capable of more than one meaning, . . . *the trier of fact* should determine whether the language used was actually understood in its defamatory sense." *Id.* at 705 (emphasis added).

[3] ABC begins by asserting that the Eleventh Circuit's opinion contains no "holding" at all on the question petitioners raise; ABC argues that the court's lengthy discussion of the bounds of its review power, combined with its decision to conduct a *de novo* review of the gist of the broadcast, did not constitute a "holding." But the court plainly held that it was empowered to ascertain the gist as part of its "independent review," Pet. App. 18a n.29, and in fact did just that.

whereas the Eleventh Circuit expressly agreed to do so, the Eighth Circuit expressly refused to do so. The *Lundell* court based its holding on this Court's teachings in the actual malice case of *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), in which this Court plainly indicated that the task of determining a publication's meaning is for the jury alone. *See* Pet. 21.

ABC next attempts to minimize *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069 (3d Cir. 1988), and *Kaelin v. Globe Communications Corp.*, 162 F.3d 1036 (9th Cir. 1998), in which the Third and Ninth Circuits held that, in public-figure cases, *juries* must determine the gist if reasonable persons could disagree on the issue. ABC argues that, because *Schiavone* and *Kaelin* were decided on summary judgment, the doctrine of independent review "was not implicated or addressed." Br. in Opp. 19 n.12. It would be pointless, however, for an appellate court to rule that an issue is for the jury and therefore may not be decided on summary judgment, but then, on a subsequent appeal of the same case after trial, to take that very issue *away* from the jury and make its own *de novo* determination. As confirmed by *Lundell* and *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), ABC's theory cannot be taken seriously.[4]

Finally, ABC attempts to explain away *one* of the two Fifth Circuit cases squarely in conflict with the Elev-

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[4] ABC's argument also conflicts with *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), another actual malice case. The Court there held that the deference given to the jury does not change as a case progresses: "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

enth Circuit's decision. ABC altogether ignores the other, *Brown v. Petrolite Corp.*, 965 F.2d 38 (5th Cir. 1992), in which the Fifth Circuit limited independent review to "the ultimate finding of actual malice," and held that it was inappropriate to "conduct *de novo* review of the jury's determinations on preliminary factual issues *or* questions of credibility." *Id.* at 46 (emphasis added). As for *Peter Scalamandre & Sons, Inc. v. Kaufman*, 113 F.3d 556 (5th Cir. 1997), ABC does not deny that the Eleventh Circuit itself recognized a conflict with *Scalamandre* or that *Scalamandre* quoted *Brown*'s holding *verbatim*. ABC does suggest that *Scalamandre*'s analysis "was precisely the same as that conducted by the Eleventh Circuit here." Br. in Opp. 19 n.12. ABC is wrong. Although the Fifth Circuit did overturn a jury verdict, it did so *not* because it made its own determination of the gist, but because it concluded, applying a *traditional* standard of review, that no reasonable jury could accept the plaintiffs' version of the broadcast's implications (which the court termed "dubious," "unrealistic," and "illogical"). *See Scalamandre*, 113 F.3d at 562. In contrast, in this case the Eleventh Circuit engaged in a *de novo* review and never suggested that a reasonable jury could not accept petitioners' version of the gist.[5]

B. ABC also suggests that this case is unusual because the Eleventh Circuit believed that its determination of the gist was "intertwined with Levan's allegations of actual malice." ABC then goes on to argue that an appellate court may properly re-examine the gist in such a case as part of its independent review of the actual malice determination. Br. in Opp. 20, 22-23. But the Eleventh

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[5] On the facts of this case, the court plainly could not have reached such a conclusion: petitioners' view was embraced by ABC's own witness (Mr. Stossel), the magistrate, the district court, ABC's own lawyers, and, ultimately, the jury.

Circuit cited only a single case from its own circuit to support this "intertwining" theory—*Braun v. Soldier of Fortune Magazine*, 968 F.2d 1110 (11th Cir. 1992), *cert. denied*, 506 U.S. 1071 (1993), a decision that ABC chooses not to embrace in its Brief in Opposition.[6] The absence of support outside the Eleventh Circuit is not surprising. Libel defendants inevitably argue that the central message of their publication was bland and general and that they never intended to convey the more toxic implications. Thus, the court's intertwining theory, if accepted, would abrogate the jury's role in nearly every libel case—a result that would nullify the Seventh Amendment's command that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Finally, ABC implies that petitioners' view of the law would be unworkable in that appellate courts would be forced to "search the trial record" to determine how the gist was articulated—"a strange task indeed," according to ABC. Br. in Opp. 24. But the Eleventh Circuit here had no trouble at all succinctly identifying the two competing gists the parties articulated before the jury:

> Appellants argue that the gist was merely that the rollups were unfair, which the broadcast demonstrated by juxtaposing the undervalued debentures that the limited partners received with Levan's financial success after the transactions were completed. Appellees, on the other hand, maintain that the gist of the broadcast was that Levan *knowingly* misled

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[6] The "intermingling" language ABC quotes (Br. in Opp. 22-23) from *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), was plainly intended to justify independent review of the actual malice determination—not of every other issue in a defamation case. ABC does not dispute that the *Bose* Court made clear that independent review applies *only* to the question of actual malice. *See Bose*, 466 U.S. at 514 n.31; *see also* Pet. 19-20.

> the limited partners into accepting the rollup transaction, thereby benefitting himself, BFC and Bank-Atlantic. This implication, appellees argue, follows from ABC's "hiding" theme: because the broadcast presented Levan as refusing to speak with ABC on camera, ABC implied that he had something to hide.

Pet. App. 18a-19a.[7] Moreover, ABC's solution—that appellate courts may avoid the task of identifying competing versions of the gist simply by deciding the gist for themselves—is flatly inconsistent with the Seventh Amendment and this Court's precedents.[8]

II. THE ELEVENTH CIRCUIT IGNORED THE INQUIRY THIS COURT PRESCRIBED IN *CONNAUGHTON*.

The Brief in Opposition altogether misses the point of petitioners' second question presented: that the Eleventh Circuit ignored the dictates of *Connaughton* and made no effort to identify the facts that the jury *must have found* to support a conclusion of actual malice. ABC has no response to petitioners' argument that, had the Eleventh Circuit identified two preliminary facts the jury must have found—first, that the core message of the broadcast was that Mr. Levan and BFC knowingly misled their investors; second, that (as Mr. Willson admitted) ABC knew *that* gist was false—actual malice would nec-

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[7] At page 19a of the Appendix to the Petition, a line of text from the Eleventh Circuit's opinion was inadvertently omitted. The sentence immediately following the call to footnote 31 should read as follows: ABC does not expressly say so, but this implication is apparent when viewing the report as a whole.

[8] In an afterthought, ABC argues that this case does not present an appropriate vehicle for certiorari because, according to the Eleventh Circuit, "the parties agree" that it is appropriate for an appellate court to determine the gist. As the Petition explained, however, petitioners never agreed to any such thing; on the contrary, they vigorously argued that determination of the gist was a jury question not subject to independent review. *See* Pet. 14-15 n.5.

essarily have been established. ABC instead argues that requiring deference to these preliminary facts would rob an appellate court of a "serious role . . . in determining whether actual malice has been proved by clear and convincing evidence," and would represent "an end run" around *Sullivan*. Br. in Opp. 27.

In fact, requiring appellate courts to identify (and defer to) such jury findings of preliminary facts is precisely the "role" prescribed in *Connaughton*, and that role is entirely consistent with *Sullivan*'s protection of free speech. Appellate courts must still determine (applying a traditional standard of review) whether the jury reasonably could have found these preliminary facts, and they must still conduct an independent examination to satisfy themselves that these facts, when combined with truly uncontroverted facts, meet the heightened standard of proof required by *Sullivan*. To say that this leaves too little for an appellate court to do in an actual malice case (*see id.*) amounts to nothing more than an attack on this Court's decision in *Connaughton*. It may be true that, as applied to this case, that standard leaves less to be done than ABC would like, but that is so only because ABC's witnesses *admitted* that they intended the broadcast to convey a more toxic gist—a core message they knew to be false.

ABC next argues that the "essence" of *Connaughton* requires appellate courts to defer only to "*credibility* determinations the jury must have made in resolving hotly disputed and conflicting testimony," and it implies that, in this case, there was no serious credibility dispute at trial. *Id.* at 26 (emphasis added).[9] In support of this

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[9] This view of the law is plainly inconsistent with the Fifth Circuit's post-*Connaughton* holdings in *Brown* and *Scalamandre*, where that court refused to extend independent review to "the

argument, ABC sets forth in detail the "mountain" of evidence it placed before the jury, summed up by Mr. Stossel's testimony that "everywhere we turned people said this was a bad deal." *Id.* at 14. ABC states that "[t]his critical testimony as to ABC's state of mind was totally uncontroverted by plaintiffs," *id.*, and parrots the Eleventh Circuit's similar conclusion in that court's attempt to distinguish *Connaughton, id.* at 28-29.

Even under this misguided reading of *Connaughton*, the Eleventh Circuit still erred. The jury unquestionably heard "hotly disputed and conflicting testimony" on credibility, which ultimately caused it to disbelieve the testimony of Messrs. Stossel and Willson. From their verdict, it is plain that the jurors instead chose to believe Messrs. Levan and Stearns, who testified that Mr. Willson told them repeatedly that, notwithstanding this "mountain" of evidence, he had serious doubts about the truth of his story and believed the truth to be "irrelevant." Pet. 9-11, 26-27.[10] Similarly, the jurors plainly rejected Mr. Stossel's claim that negative information was "everywhere we turned," in favor of evidence showing (among other things) that ABC purposely shunned investors who were "not angry enough." In conducting its actual malice inquiry under *Connaughton*, the Eleventh Circuit was obliged to accept these determinations.

At the end of the day, the jurors were forced to choose between the "avalanche" of paper that Messrs. Willson

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jury's determinations on preliminary factual issues *or* questions of credibility." *Brown*, 965 F.2d at 46 (emphasis added); *Scalamandre*, 113 F.3d at 560 (emphasis added).

[10] The jury's determination in this regard is not surprising, for even ABC did not put much stock in its "mountain." *None* of the sources discussed in the eight pages of the Brief in Opposition devoted to ABC's newsgathering activities (Br. in Opp. 7-14) was actually quoted in the broadcast.

and Stossel cobbled together for trial, and the testimony of live witnesses who looked them in the eye and swore that ABC's witnesses told them they did not believe in the basic truth of their story and did not care. Having seen none of the testimony, the Eleventh Circuit substituted its beliefs for those who had. *Connaughton* squarely prohibits the Eleventh Circuit's approach.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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